DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 10-637
Title: Eric Greene, aka Jarmaine Q. Trice, Petitioner
v.
Jon Fisher, Superintendent, State Correctional Institution at Smithfield, et al.
Docketed: November 15, 2010
Linked with 10A350
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (07-2163)
Decision Date: May 28, 2010
Rehearing Denied: July 20, 2010
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Oct 2 2010	Application (10A350) to extend the time to file a petition for a writ of certiorari from October 18, 2010 to November 17, 2010, submitted to Justice Alito.
Oct 6 2010	Application (10A350) granted by Justice Alito extending the time to file until November 17, 2010.
Nov 12 2010	Petition for a writ of certiorari filed. (Response due December 15, 2010)
Nov 22 2010	Waiver of right of respondent Jon Fisher, Superintendent, State Correctional Institution at Smithfield, et al. to respond filed.
Dec 1 2010	DISTRIBUTED for Conference of January 7, 2011.
Dec 3 2010	Response Requested. (Due January 3, 2011)
Dec 30 2010	Order extending time to file response to petition to and including February 2, 2011.
Jan 3 2011	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Jan 25 2011	Order further extending time to file response to petition to and including March 4, 2011.
Mar 4 2011	Brief of respondents Jon Fisher, Superintendent, State Correctional Institution at Smithfield, et al. filed.
Mar 15 2011	Reply of petitioner Eric Greene, aka Jarmaine Q. Trice filed.
Mar 16 2011	DISTRIBUTED for Conference of April 1, 2011.
Mar 28 2011	DISTRIBUTED for Conference of April 1, 2011.
Apr 4 2011	Petition GRANTED.
Apr 21 2011	The time to file the joint appendix and petitioner's brief on the merits is extended to and including June 17, 2011.
Apr 21 2011	The time to file respondents' brief on the merits is extended to and including August 15, 2011.
Jun 17 2011	Joint appendix filed. (Statement of costs filed)
Jun 17 2011	Brief of petitioner Eric Greene, aka Jarmaine Q. Trice filed.

Jun 24 2011	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jul 19 2011	SET FOR ARGUMENT ON Tuesday, October 11, 2011.
Aug 2 2011	CIRCULATED.
Aug 15 2011	Brief of respondent Jon Fisher, Superintendent, State Correctional Institution at Smithfield, et al. filed. (Distributed)
Aug 17 2011	Record from U.S.C.A. for 3rd Circuit is electronic.
Aug 22 2011	Brief amici curiae of Texas, et al. filed. (Distributed)
Aug 23 2011	Record received from U.S.D.C. for Eastern District of Pennsylvania. 1 (box)
Sep 14 2011	Reply of petitioner Eric Greene, aka Jarmaine Q. Trice filed. (Distributed)
Oct 11 2011	Argued. For petitioner: Jeffrey L. Fisher, Stanford, Cal. For respondents: Ronald Eisenberg, Deputy District Attorney, Philadelphia, Pa.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-637 NOV 12 2010

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No. 10-

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JOHN A. PALAKOVICH,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTORY PROVISION 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 9

I. The Courts of Appeals Are Divided Over the Temporal Cutoff for Determining "Clearly Established Federal Law" Under AEDPA. 10

A. Background 10

B. The Circuit Split 13

II. The Question Presented Is of Substantial Importance 17

III. This Case Is An Ideal Vehicle for the Court To Resolve This Issue 21

IV. The Third Circuit's Decision Misconstrues AEDPA. 22

CONCLUSION 28

APPENDIX

Court of Appeals' Opinion 1a

Order Amending Dissenting Opinion 70a

District Court's Opinion 72a

Order Denying Rehearing En Banc 83a

TABLE OF AUTHORITIES

Cases

Blakely v. Washington, 542 U.S. 296 (2004) 17, 18

Boumediene v. Bush, 553 U.S. 723 (2008) 26

Brown v. Greiner, 409 F.3d 523 (2d Cir. 2005) 12

Bruton v. United States, 391 U.S. 123 (1968) 3, 4, 5, 6

Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) 22

Carey v. Musladin, 549 U.S. 70 (2006) 25

Chisom v. Roemer, 501 U.S. 380 (1991) 22

Commonwealth v. Trice, 552 Pa. 201 (1998) 5

Commonwealth v. Trice, 556 Pa. 265 (1998) 5

Crawford v. Washington, 541 U.S. 36 (2004) 17, 18

Danforth v. Minnesota, 552 U.S. 264 (2008) 22

Dep't of Commerce v. United States House of Representatives, 525 U.S. 316 (1998) 22

Dir. of Revenue of Mo. v. CoBank ACB, 531 U.S. 316 (2001) 22

Dir., OWCP v. Perini N. River Assoc., 459 U.S. 297 (1983) 22

Early v. Packer, 537 U.S. 3 (2002) (per curiam) 24

Felker v. Turpin, 518 U.S. 651 (1996) 26, 27

Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1710 (2010) 15, 18, 26

Frazer v. South Carolina, 430 F.3d 696 (4th Cir. 2005) 17

Giles v. California, 128 S. Ct. 2678 (2008) 18

Gray v. Maryland, 523 U.S. 185 (1998) ..... *passim*

Griffith v. Kentucky, 479 U.S. 314 (1987) 8, 11, 25, 26

Grogan v. Garner, 498 U.S. 279 (1991) 22

INS v. St. Cyr, 533 U.S. 289 (2001) 27

Keene Corp. v. United States, 508 U.S. 200 (1993) 23

Lindh v. Murphy, 521 U.S. 320 (1997) 23

Lingle v. Chevron U.S.A., Inc., 544 U.S. 528 (2005) 25

Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) 18

Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) ..... *passim*

Mills v. Maryland, 486 U.S. 367 (1988) 17

Missouri v. Seibert, 542 U.S. 600 (2004) 17, 18

Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008) 16

Padilla v. Kentucky, 130 S. Ct. 1473 (2010) 18

Portalatin v. Graham, ___ F.3d ___, 2010 WL 4055571 (2d Cir. Oct. 18, 2010) (en banc) 12, 18

Richardson v. Marsh, 481 U.S. 200 (1987) 4

Russello v. United States, 464 U.S. 16 (1983) 24

Smith v. Spisak, 130 S. Ct. 676 (2010) ..... *passim*

Strickland v. Washington, 466 U.S. 668 (1984) 11

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Thaler v. Haynes, 130 S. Ct. 1171 (2010) 9, 13

Thompson v. Runnel, ___ F.3d ___, 2010 WL 3489837 (9th Cir. Sept. 8, 2010) 15, 16, 18

United States v. O'Brien, 130 S. Ct. 2169 (2010) 22

Whorton v. Bockting, 549 U.S. 406 (2007) 11

Williams v. Taylor, 529 U.S. 362 (2000) ..... *passim*

Constitutional Authorities

Suspension Clause, U.S. Const. art. I, § 9, cl. 2 ..... 26, 27

Statutes and Regulations

28 U.S.C. § 1254(1) 1

28 U.S.C. § 2254(d) ..... *passim*

28 U.S.C. § 2254(d)(1) 6, 7, 11, 23

24 Pa. Code § 122(B)(2) (2010) 20

Other Authorities

Administrative Office of the United States Courts, 2009 Annual Report of the Director: Judicial Business of the United States Courts (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf 18

Bureau of Justice Statistics, Prisoner Petitions Filed in U.S. District Courts, 2000 (2001), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=882 18

PETITION FOR A WRIT OF CERTIORARI

Petitioner Eric Greene respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Third Circuit in *Greene v. Palakovich*, No. 07-2163.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit (Pet. App. 1a) is published at 606 F.3d 85. The relevant district court opinion (Pet. App. 72a) is published at 482 F. Supp. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2010, and subsequently amended on July 22, 2010. A timely petition for rehearing en banc was denied on July 20, 2010. Pet. App. 83a-84a. On October 2, 2010, Justice Alito extended the filing deadline for filing a petition for writ of certiorari to and including November 17, 2010. No. 10A350. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254(d) provides:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

1. resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
2. resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

This case presents an important question of habeas procedure that this Court reserved last Term in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010): whether a decision from this Court announced before a state prisoner's conviction became final but after his last state-court decision on the merits constitutes "clearly established Federal law" for purposes of AEDPA. The Third Circuit, acknowledging that it was creating a circuit split, held here that it does not.

1. In early 1993, a group of men robbed a grocery store in Philadelphia. One of them shot the store's owner, who died shortly afterwards. The men took the store's cash register with them.

Over the next several months, the police questioned petitioner Eric Greene and a number of other men (some of whom had been arrested in connection with another robbery) about the grocery store incident. Petitioner denied any involvement, but the police obtained confessions from three of the other men. All three men who gave statements identified Julius Jenkins as the shooter and claimed that petitioner was one of the participants. But their

accounts diverged from there. According to one man, petitioner was involved in the robbery but remained in the car the entire time. Another man said petitioner carried the cash register out of the store. This man later amended his statement to change the number of people involved in the robbery from five to six. A third implicated petitioner in the robbery but did not describe petitioner's role.

The State subsequently charged petitioner and three other men with, among other things, second-degree murder, three counts of robbery, and conspiracy. The State also charged Julius Jenkins with first-degree murder. The State proposed a joint trial for all five accused men.

When it became clear that the codefendants who had given statements implicating petitioner in the crimes were not going to testify, petitioner moved to sever his trial from theirs. In support of this motion, petitioner pointed out that the Confrontation Clause, as explicated in *Bruton v. United States*, 391 U.S. 123 (1968), prohibits the prosecution from introducing a nontestifying defendant's confession in a joint trial with a codefendant whom the confession also implicates. Instead of severing the trials, however, the court asked the State to redact the codefendants' statements to remove the prejudicial references to petitioner.

The State accordingly redacted the statements – but only barely. In some places, the State redacted the statements to replace petitioner's name and those of other defendants with neutral pronouns and phrases like "this guy" and "these guys." Pet. App. 7a-8a. In other places, the State simply deleted or replaced petitioner's name with the word "blank,"

making it obvious that redactions had occurred. Pet. App. 9a. The trial court nonetheless accepted these redactions and ruled that they cured the *Bruton* problem. *See Richardson v. Marsh*, 481 U.S. 200 (1987) (sufficient redactions can cure *Bruton* problems).

At the joint trial, petitioner's codefendants did not testify, and the State introduced their redacted confessions against them. The jury found petitioner guilty, and the court sentenced him to life imprisonment. Pet. App. 9a.

2. Petitioner appealed his conviction to the Pennsylvania Superior Court. Among other arguments, he renewed his Confrontation Clause claim. The Pennsylvania Superior Court affirmed, holding that the codefendants' confessions as redacted did not so clearly implicate petitioner as to violate the Confrontation Clause. Pet. App. 9a-10a.

3. Petitioner then filed a timely petition for allowance of appeal with the Pennsylvania Supreme Court, again pressing his Confrontation Clause claim. While his petition was pending, this Court decided *Gray v. Maryland*, 523 U.S. 185 (1998). In *Gray*, this Court considered a *Bruton* challenge to the admission of a codefendant's confession that – just as in this case – had been redacted to replace the defendant's name in various places with blanks and words signaling obvious deletions. This Court held that "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *Gray*, 523 U.S. at 195.

The Pennsylvania Supreme Court then granted the petition for allowance of appeal limited to the Confrontation Clause issue. *Commonwealth v. Trice*, 552 Pa. 201 (1998).[1] Petitioner filed a brief explaining that the redacted statements were clearly inadmissible under *Gray*. Appellant's Br. 16, 24, *Commonwealth v. Trice*, 556 Pa. 265 (1998), *available at* 1998 WL 34114494. Eight months after granting the petition, however, the Pennsylvania Supreme Court dismissed petitioner's appeal "as having been improvidently granted." *Commonwealth v. Trice*, 556 Pa. 265 (1999). The court offered no explanation for its dismissal.

4. Later that year, the time for filing a petition for certiorari to this Court expired and petitioner's conviction became final. Pet. App. 10a-11a.

5. After unsuccessful state habeas proceedings (in which he represented himself), petitioner filed a timely petition for federal habeas relief in the United States District Court for the Eastern District of Pennsylvania. He sought relief under several grounds, including the principles set forth in *Bruton* and *Gray*.

Section 2254 of Title 28 of the U.S. Code, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), allows federal courts to grant habeas relief if a state court's adjudication of a federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable

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[1] Petitioner is also known as Jarmaine Q. Trice, and he was referred to by this name in the state-court proceedings.

application of, *clearly established Federal law*, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1) (emphasis added).

The district court observed that the "key to assessing the merits of Petitioner's claim" was whether a decision that this Court issued before a prisoner's conviction became final but after the last state-court decision on the merits counts as "clearly established Federal law" under AEDPA. Pet. App. 77a. If so, then *Gray* would apply for purposes of petitioner's case. But if not, then the state courts' adjudication of petitioner's *Bruton* claim would be much easier to defend.

The district court initially referred this legal issue to a magistrate, who concluded that two passages of this Court's opinion in *Williams v. Taylor*, 529 U.S. 362 (2000), offered conflicting guidance on the issue. In Part III of the majority opinion, written by Justice Stevens, this Court characterized "clearly established Federal law" as "a rule of law that was clearly established *at the time his state-court conviction became final*." *Williams*, 529 U.S. at 390 (emphasis added). In Part II of the majority opinion, however, this Court said through Justice O'Connor that "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." *Id.* at 412 (emphasis added).

Faced with these differing formulations, the magistrate decided to follow Justice O'Connor's formulation, and reasoned that the "relevant state-court decision" in this case was the intermediate appellate decision rejecting petitioner's claim on the merits. Pet. App. 78a. Freed from having to apply

Gray to petitioner's case, the magistrate then recommended that the district court deny the petition. Pet. App. 74a-75a.

The district court adopted the magistrate's report and recommendation. At the same time, it granted petitioner a certificate of appealability limited to his Confrontation Clause claim, explaining that "reasonable jurists could disagree as to the appropriate point in time upon which to identify the 'clearly established law.'" Pet. App. 78a-79a; *see also* Pet. App. 82a.

6. A divided panel of the Third Circuit affirmed. The majority began by noting the "uncertainty identified by the Supreme Court" in *Spisak*, 130 S. Ct. at 681, over "whether 'clearly established Federal law' under 28 U.S.C. § 2254(d)(1) is determined based on the 'time of the relevant state-court decision,' the time [the] state-court conviction became final,' or some combination thereof." Pet. App. 16a, 17a n.6 (quoting *Williams*, 529 U.S. at 390, 412). The court of appeals described the question as a "thorny" and "vexing" one to which "there is no clear answer." Pet. App. 2a, 16a, 21a n.7; *see also* Pet. App. 18a ("confusion surrounds" the issue). The majority further recognized that in this case, the issue "cannot, no matter how one views the facts or law, be avoided." Pet. App. 43a.

Acknowledging that it was creating a split with the First Circuit, Pet. App. 19a n.7 (citing *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009)), the majority adopted the formulation from Justice O'Connor's part of the opinion in *Williams*, and held that "the date of the relevant state-court decision is the controlling date." Pet. App. 18a. The majority

asserted that the text of AEDPA and post-*Williams* precedent supported its conclusion. Pet. App. 18a-28a. But the majority conceded that this Court would have to be the final arbiter of the issue: "We believe that we have reached the best conclusion given the guidance we have to date. Ultimately, only the Supreme Court can resolve such uncertainty as exists." Pet. App. 43a.

Judge Ambro dissented. He noted that before AEDPA, this Court had made clear in *Teague v. Lane*, 489 U.S. 288 (1989), and *Griffith v. Kentucky*, 479 U.S. 314 (1987), that a state prisoner could seek habeas relief based on any decision issued before his conviction became final. He also noted that the text of amended Section 2254(d) does not contain "an express time cutoff for 'clearly established Federal law.'" Pet. App. 48a. Consequently, Judge Ambro concluded that Congress did not intend to alter the previously settled law on the point: "It is the Supreme Court's retroactivity jurisprudence of *Griffith* or *Teague* that determines applicability on collateral review, not AEDPA." Pet. App. 61a.

Judge Ambro further complained that the majority's new temporal cutoff would create a "twilight zone" of arbitrariness for criminal defendants in state court. Pet. App. 62a. While *Teague*'s finality rule minimizes disparate treatment of similarly situated prisoners, outcomes under the majority's rule would depend haphazardly on whether a state supreme court decided to exercise discretionary authority to hear a case implicating a new decision from this Court. Under such a regime, Judge Ambro explained, some state prisoners inevitably would be "unfairly treated relative to other

similarly situated individuals who were lucky enough to have the state courts apply the new rule." Pet. App. 68a.

7. Petitioner filed a timely petition for rehearing en banc. *See* Pet. App. 83a-84a. The Third Circuit denied the petition, with Judge Ambro noting that he would have granted rehearing. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents a fundamental question of federal habeas procedure in the post-AEDPA world: What is the temporal cutoff for when decisions from this Court count as "clearly established Federal law"? Specifically, is a decision that this Court handed down before a state prisoner's conviction became final but after his last state-court adjudication on the merits "clearly established Federal law"?

In *Williams v. Taylor*, 529 U.S. 362 (2000), this Court gave conflicting guidance on this issue, stating in one part of the opinion that the cutoff for applying "clearly established Federal law" is finality, and in another part that the cutoff is the "relevant state-court decision." *Id.* at 390, 412. Last Term, this Court referenced these two divergent formulations and stated that they created "some uncertainty" over how to apply AEDPA when a state prisoner seeks federal habeas relief based on a decision that satisfies one formula but not the other. *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010); *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1174 n.2 (2010) (per curiam) (referencing both formulations without choosing between the two). It therefore is not surprising that federal courts of appeals are now openly split on the question. Some circuits, consistent with this Court's pre-AEDPA

construction of federal habeas law in *Teague v. Lane*, 489 U.S. 288 (1989), continue to set the cutoff at the date on which a state-court conviction became final. In this case, by contrast, the Third Circuit adopted as the controlling date the time of the last state-court decision on the merits, holding that a decision from this Court that preceded not only finality but also the state supreme court's refusal to hear the prisoner's claim did not count as "clearly established Federal law" because it postdated the state intermediate court's decision on the merits.

As the Third Circuit itself strongly suggested in this very case, *see* Pet. App. 43a, this Court should resolve this conflict of authority. This basic procedural issue has already confronted numerous federal courts, and it will continue to arise in the context of an array of substantive constitutional claims. The question is outcome determinative in this case. Finally, the Third Circuit's holding that AEDPA changed longstanding retroactivity law is incorrect.

I. The Courts Of Appeals Are Divided Over The Temporal Cutoff For Whether A Decision From This Court Counts As "Clearly Established Federal Law" Under AEDPA.

A. Background

Section 2254 of Title 28 of the U.S. Code has long allowed state prisoners who demonstrate that their constitutional rights were violated in state-court proceedings to obtain federal habeas relief. Interpreting and applying this statute in *Teague v. Lane*, 489 U.S. 288 (1989), this Court held that a federal court adjudicating a state prisoner's petition

for habeas relief must apply any relevant decisions from this Court that were handed down before the prisoner's conviction became "final." *See id.* at 310 (plurality opinion); *accord Whorton v. Bockting*, 549 U.S. 406, 416 (2007). Finality is a straightforward concept: A case becomes "final" when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). At the same time, prisoners generally may not benefit from decisions that are issued after their convictions become final. *See, e.g.*, *Teague*, 489 U.S. at 310.

Congress amended Section 2254 as part of AEDPA. The statute now provides, in pertinent part, that federal courts may not grant habeas relief concerning a claim that a state court adjudicated on the merits unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1).

This Court confronted AEDPA's amendments to Section 2254 in *Williams v. Taylor*, 529 U.S. 362 (2000). There, this Court clarified the level of deference that AEDPA requires federal courts to give to a state court's interpretation and application of federal law. *Id.* at 403-04. Timing was not an issue, however, because the relevant Supreme Court decision, *Strickland v. Washington*, 466 U.S. 668 (1984), was decided long before Williams' state-court proceedings.

Different parts of the majority opinion nevertheless contained passages indicating different

temporal cutoffs for determining what constitutes "clearly established Federal law" under AEDPA. Part III of the majority opinion, written by Justice Stevens, stated that "clearly established Federal law" refers to Supreme Court decisions at the "time a state-court decision became final." *Id.* at 390. Part II of the majority opinion, written by Justice O'Connor, stated – consistent with Part III – that any decision from this Court that "would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law'" under AEDPA. *Id.* at 412. Another sentence in the same paragraph, however, suggested that "clearly established Federal law" referred to Supreme Court holdings "as of the time of the relevant state-court decision," *id.* – a point in time that normally precedes *Teague*'s finality cutoff date by several months.

Nothing in this Court's opinion signaled any appreciation that this last formulation diverged from the others. (To the contrary, Justice O'Connor joined both portions of the opinion, suggesting that she did not realize that the formulations diverged.) Nor did this Court attempt to reconcile the various formulations. Accordingly, federal courts of appeals have read *Williams* as giving "inconsistent guidance" concerning the temporal cutoff for determining what constitutes "clearly established Federal law." *Brown v. Greiner*, 409 F.3d 523, 533 n.3 (2d Cir. 2005); *see also Portalatin v. Graham*, ___ F.3d ___, 2010 WL 4055571, at *9 n.6 (2d Cir. Oct. 18, 2010) (en banc) (same); *Miller v. Stovall*, 608 F.3d 913, 929 (6th Cir. 2010) (Boggs, J., dissenting) (noting the "contradictory statements" in *Williams*); Pet. App. 22a n.7 ("[R]esolution of the issue in the Courts of

Appeals based on existing Supreme Court precedent is akin to trying to piece together a jigsaw puzzle that has been sprinkled with pieces from other puzzles.").

In *Smith v. Spisak*, 130 S. Ct. 676 (2010), this Court itself acknowledged "some uncertainty" over where to fix the temporal cutoff for clearly established law under AEDPA. *Id.* at 681. Assuming, like both parties in that case, that finality was the proper cutoff date, this Court applied a decision that predated finality but postdated the last state-court decision on the merits. *Id.* But this Court stopped short of holding that finality was the legally proper cutoff date, concluding that it was unnecessary to resolve the issue because the prisoner was not entitled to relief even if the new decision applied. *Id.*; *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1174 n.2 (2010) (per curiam) (referencing both formulations without choosing between the two).

B. The Circuit Split

In the several months since this Court noted "some uncertainty" over the issue in *Spisak*, several federal courts of appeals have confronted cases in which state prisoners sought relief based on decisions from this Court that preceded finality but postdated the last state-court decisions on the merits of their claims. The circuits are now intractably split over the proper temporal cutoff for when a decision from this Court qualifies as "clearly established law" under Section 2254(d).

1. Several courts of appeals have held – as the dissenting judge urged the Third Circuit to do here (Pet. App. 43a-69a) (Ambro, J., dissenting) – that the date of finality serves as the proper cutoff for

deciding what counts as clearly established federal law.

The Sixth Circuit provided four reasons for adhering to the date of finality as the cutoff rather than adopting the date of the relevant state-court decision. *See Miller v. Stovall*, 608 F.3d 913, 919-21 (6th Cir. 2010). First, the Sixth Circuit observed that prior to AEDPA, *Teague* had set a clear cutoff for applying new Supreme Court decisions to habeas petitioners, and that Congress did not evince any intent to change that cutoff. *Id.* at 920-21. Second, the Sixth Circuit noted that Justice O'Connor joined the part of Justice Stevens' opinion for this Court describing finality as the cutoff. *Id.* at 919. Third, the Sixth Circuit pointed out that even the part of *Williams* that Justice O'Connor wrote explained that any decision from this Court that would qualify as an "old rule" under *Teague* would also qualify as "clearly established" under AEDPA. *Id.* at 919-20. Finally, the Sixth Circuit reasoned that applying federal law up to the point at which a conviction becomes final respects principles of comity, finality, and federalism – at least when the petitioner has provided a state court of last resort with an opportunity to apply new governing federal law. *Id.* at 921.

Similarly, the First Circuit has held that finality is the cutoff, relying in large part on this Court's statement in Justice O'Connor's portion of the opinion in *Williams* that any decision from this Court that qualifies as an "old rule" under *Teague* would qualify as "clearly established Federal law" under

AEDPA. *Foxworth v. St. Amand*, 570 F.3d 414, 431 (1st Cir. 2009), *cert. denied*, 130 S. Ct. 1710 (2010).[2] The *Foxworth* court called this passage "a frank recognition that the AEDPA has neither altered nor eroded the marker laid down by *Teague*." *Id.*

Following this Court's lead in *Spisak*, the Ninth Circuit also has assumed that AEDPA's cutoff date is finality, at least when a state does not contest the issue. *Thompson v. Runnel*, ___ F.3d ___, ___, 2010 WL 3489837, at *6 n.7 (9th Cir. Sept. 8, 2010). But unlike this Court in *Spisak*, the Ninth Circuit granted habeas relief based upon that assumption, turning aside a dissenting judge's objection that, regardless of whether a state raises the issue, AEDPA precludes such relief whenever the relevant decision from this Court postdated the last state-court decision on the merits. *Compare id.* at *10 *with id.* at *12 (Ikuta, J., dissenting).

2. Acknowledging that it was creating a split with the First Circuit (the decisions just described from the Sixth and Ninth Circuits had not yet come down), *see* Pet. App. 19a n.7, the Third Circuit held here that AEDPA requires courts to abandon the cutoff date established in *Teague* and to apply only law that existed at the time of the last state-court decision on the merits. Pet. App. 24a-25a. Specifically, the majority reasoned that the language in Section 2254(d) focusing on whether a state court adjudicated the claim at issue "on the merits" and on

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[2] The habeas petitioner sought certiorari in *Foxworth* because he lost in the court of appeals on other grounds. He did not raise the question presented here.

whether the relevant state-court "decision" was contrary to clearly established law "contemplates that the law or precedent *existed* at the time of the state court's substantive resolution of the petitioner's claim." Pet. App. 25a. The majority also claimed support for this holding in this Court's post-*Williams* cases that cite the formulation from Justice O'Connor's portion of that opinion, although the majority recognized that none of those cases contain any actual "analysis" of the issue. Pet. App. 25a-28a.

Although the Third Circuit stands alone in setting AEDPA's temporal cutoff for "clearly established law" at the date of the last state-court decision on the merits, other circuit judges have agreed with the holding. In particular, the dissent in the Ninth Circuit's *Thompson* case argued that the cutoff should be "the time of the relevant state-court decision." *See Thompson*, 2010 WL 3489837, at *12 (Ikuta, J., dissenting). The dissent in the Sixth Circuit's *Miller* case likewise expressed "serious doubts" about that court's decision to adhere to the finality cutoff established in *Teague*, which in his view "penalize[s] state courts for making *correct* decisions that merely fail to predict the future." *Miller*, 608 F.3d at 931-32 (Boggs, J., dissenting).[3]

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[3] In two other cases, which predated *Spisak* and involved slightly different questions of timing, individual judges on the Eleventh and Fourth Circuits also asserted that the date of the last state-court decision on the merits should control. *See Newland v. Hall*, 527 F.3d 1162, 1198 n.62, 1200 n.64 (11th Cir. 2008) (opinion of Tjoflat, J.) (arguing that the Eleventh Circuit should adopt this rule "largely because the [Supreme] Court has clearly favored using this definition in cases after *Williams*");

3. This split of authority is now firmly entrenched. The courts of appeals have issued decisions conflicting with the Third Circuit's holding both before and after the decision at issue here. Moreover, the Sixth Circuit denied rehearing en banc in *Miller* on September 22, 2010, rebuffing the State of Michigan's request that it adopt the Third Circuit's rule. Two months earlier, the Third Circuit rejected petitioner's request for rehearing en banc in this case, declining to consider aligning itself with the other circuits to have spoken on the issue. Pet. App. 83a-84a. Only this Court can resolve this legal disagreement.

II. The Question Presented Is Of Substantial Importance.

The question of what federal law applies in adjudicating a habeas petition is a basic one that this Court should resolve as soon as possible.

1. This question recurs frequently. It has arisen over the past several months as a result of a number of substantive decisions from this Court, including *Missouri v. Seibert*, 542 U.S. 600 (2004) (*Miranda* rights); *Blakely v. Washington*, 542 U.S. 296 (2004) (right to jury trial); *Crawford v. Washington*, 541 U.S. 36 (2004) (Confrontation Clause); *Gray v. Maryland*, 523 U.S. 185 (1998) (same); and *Mills v. Maryland*, 486 U.S. 367 (1988) (mitigating evidence

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Frazer v. South Carolina, 430 F.3d 696, 721 n.4 (4th Cir. 2005) (Luttig, J., dissenting) (arguing that "not everything that is an old rule under *Teague* is clearly established for purposes of AEDPA").

in capital cases). *See Spisak*, 130 S. Ct. 676 (*Mills*); Pet. App. 1a (*Gray*); *Foxworth*, 570 F.3d 414 (same); *Portalatin*, ___ F.3d at ___, 2010 WL 4055571 (*Blakely*); *Thompson*, 2010 WL 3489837 (*Seibert*); *Miller*, 608 F.3d 913 (*Crawford*).

Moreover, this issue will continue to arise. Over the past few Terms, this Court has announced several important new rules of criminal procedure that apply across a wide range of state criminal prosecutions. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009); *Giles v. California*, 128 S. Ct. 2678 (2008). And if past is prologue, this Court will announce other new rules in the future.

There can be no doubt that many state prisoners will find themselves caught between state-court decisions on the merits and finality when these new rules are issued, and will eventually seek to rely on them to obtain federal habeas relief. Thousands of state prisoners file petitions for federal habeas relief each year.[4] And the "twilight zone" between a

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[4] In each of the last five years, prisoners filed more than 20,000 petitions for writs of habeas corpus in United States district courts. *See* Administrative Office of the United States Courts, 2009 Annual Report of the Director: Judicial Business of the United States Courts at t.C-2A (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf. The vast majority of these petitions were filed by state prisoners. *See* Bureau of Justice Statistics, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 at 2 t.1 (2001), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=882.

prisoner's last state-court decision on the merits and finality of conviction, Pet. App. 62a (Ambro, J., dissenting), may last well over a year. For example, the gap in this case between the intermediate state court's decision and finality lasted nineteen months. *See* Pet. App. 9a-11a. In *Miller*, it was fifteen months. *Miller*, 608 F.3d at 917, 918 n.1. And in *Spisak*, it was nearly eleven months. *See* Pet. App. 50a n.6 (Ambro, J., dissenting).[5] These are substantial periods of time in jurisprudential terms.

2. The answer to this temporal cutoff question also shapes the conduct of state courts and state prisoners. State supreme courts, in particular, need to know whether their decisions to deny or grant discretionary review will affect state prisoners' ability to obtain habeas relief. Under the traditional finality rule, a state supreme court's decision whether to hear a case does not significantly affect the playing field for federal habeas. But under the Third Circuit's rule, state-court discretionary review practices would take on a whole new gravity. A state supreme court's refusal to hear a case would fix the available law on federal habeas at a significantly

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[5] A moment's reflection reveals why this "twilight zone" can last so long. State supreme courts typically exercise discretion to hear only a fraction of the criminal cases that come to them, so the last state court decision on the merits is usually from a state intermediate appellate court. Following such a decision, a prisoner sometimes requests rehearing by the intermediate court. A prisoner then asks the state supreme court to review the case, and may later seek rehearing of some kind. He may finally seek certiorari in this Court. Each of these several steps usually lasts several months, during which parties write briefs and courts consider them.

earlier date – the date of the intermediate state-court decision – thereby foreclosing reliance on Supreme Court jurisprudence that might otherwise dictate relief. Furthermore, many state supreme courts, including the Pennsylvania Supreme Court, lack any established practice comparable to this Court's "grant, vacate, and remand" (GVR) system to deal with intervening decisions from this Court. Thus, only a state supreme court's decision to grant plenary review, and then to issue an opinion on the merits, would enable a state prisoner to invoke intervening decisions from this Court.

For their part, state prisoners (and those who represent them) also need to know the cutoff date for applying "clearly established Federal law" under AEDPA. Some state prisoners who have lost in state court do not seek certiorari in this Court, even when this Court has issued a potentially helpful intervening decision. There might be any number of tactical reasons for doing this: The prisoner may, for example, think that he will obtain more absolute relief in state habeas on some other claim, or the state court might have given an alternative reason for denying relief that the prisoner needs to challenge in federal habeas as well. Or a decision to forego seeking certiorari might not be tactical at all: In many states (including Pennsylvania), appointments of counsel run only through the state-court system and do not include seeking certiorari in this Court. *See, e.g.*, 24 Pa. Code § 122(B)(2) (2010), Comment (appointment runs "through the Supreme Court of Pennsylvania").

Under the Third Circuit's rule, in short, state prisoners with claims affected by intervening

decisions would *always* want to – indeed, need to seek certiorari (and a GVR) in this Court. Otherwise, they would forever forego the ability to obtain the benefit of this Court's new decision. This Court should clarify whether such filings are now necessary as soon as possible.

III. This Case Is An Ideal Vehicle For The Court To Resolve This Issue.

As the Third Circuit acknowledged, this case presents "the perfect storm of facts" for deciding the cutoff date for "clearly established Federal law" under Section 2254(d). Pet. App. 23a.

Greene's habeas petition "turns on whether he may invoke [this Court's decision in] *Gray*." Pet. App. 23a; *see also* Pet. App. 77a (describing the cutoff question as the "key to assessing the merits of Petitioner's claim"). And this Court decided *Gray* before petitioner's conviction became final (and before the Pennsylvania Supreme Court decided not to review his case), but after the last reasoned state-court decision affirming his conviction. Accordingly, this case squarely presents the question of AEDPA's temporal cutoff date such that it "cannot . . . be avoided." Pet. App. 43a; *see also* Pet. App. 23a (this case presents "the inescapable obligation" to decide the issue).

IV. The Third Circuit's Decision Misconstrues AEDPA.

The Third Circuit's holding that AEDPA altered retroactivity law for federal habeas claims is incorrect.

1. The text and structure of AEDPA, along with this Court's precedent, make clear that a state prisoner may still seek habeas relief based on a decision from this Court that was announced before his conviction became final.

It is "not only appropriate but also realistic to presume that Congress [i]s thoroughly familiar" with this Court's jurisprudence when it legislates. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979). Accordingly, this Court consistently has refused to disturb settled interpretations of statutory provisions "[a]bsent a clear indication from Congress of a change in policy." *Grogan v. Garner*, 498 U.S. 279, 290 (1991); *accord United States v. O'Brien*, 130 S. Ct. 2169, 2178 (2010); *Dir. of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323 (2001); *Dep't of Commerce v. United States House of Representatives*, 525 U.S. 316, 343 (1998); *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991); *Dir., OWCP v. Perini N. River Assoc.*, 459 U.S. 297, 319-21 (1983).

Teague, which "was an exercise of this Court's power to interpret the federal habeas statute," *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), formed the jurisprudential backdrop to AEDPA with respect to state prisoners' ability to claim the benefit on federal habeas of one of this Court's decisions. *Teague* established that state prisoners could seek relief based on new constitutional rules of criminal procedure announced before their convictions became final, but they generally cannot do so based on decisions that postdated finality. *Teague*, 489 U.S. at 310.

There is no clear indication in the text of Section 2254 that Congress intended to alter this well-

established retroactivity doctrine. On the contrary, to the extent that the text and structure of Section 2254(d) shed any light on Congress' goals, they confirm that Congress expected to retain *Teague*'s cutoff date. Subsection 2254(d)(1) allows a federal court to grant habeas relief if the state court's "adjudication of the claim *resulted* in a decision that was contrary to . . . clearly established Federal law" (emphasis added). This ultimate focus on the "result[]" of the state-court proceedings, rather than the reasoning employed in the adjudication, indicates that it is the outcome of a case, not the state court's reasoning, that AEDPA directs courts to measure against "clearly established Federal law." Hence, so long as a pertinent decision from this Court came down while a state prisoner's case was still on direct review in state court (and so long as the prisoner properly preserved the issue all along), it does not matter whether the last state tribunal to reach the merits considered that precedent.

The structure of Section 2254(d) reinforces this point. Subsection 2254(d)(2) explicitly provides that federal courts should evaluate a state court's determination of facts "in light of the *evidence presented in the State court proceeding*" (emphasis added). The text of Subsection 2254(d)(1), by contrast, does not limit a federal court's legal analysis to what federal law was available to the state court at the time of the proceeding. "[W]here Congress includes particular language in one section of a statute but omits it in another," courts should assume Congress intended the two to be construed differently. *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*,

464 U.S. 16, 23 (1983) (citation omitted)); *see also Lindh v. Murphy*, 521 U.S. 320, 330-38 (1997) (drawing a similar negative implication respecting other provisions of AEDPA).

This Court's precedent further demonstrates that – contrary to the Third Circuit's holding – a decision from this Court need not have "*existed* at the time of the state court's substantive resolution of the petitioner's claim" (Pet. App. 25a) in order for a federal court to apply it in a federal habeas proceeding. In *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), the Ninth Circuit granted habeas relief based in part upon a state court's failure to cite a controlling decision from this Court. *Id.* at 8. This Court reversed, explaining that avoiding AEDPA's pitfalls "does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

If it does not matter under AEDPA whether a state court is aware of a relevant case from this Court, it follows that it is irrelevant whether a case existed at the time of the state-court decision. Rather, what matters is whether the state-court proceedings "resulted in a decision" that – measured against the proper body of this Court's case law – was contrary to, or an unreasonable application of, clearly established law. And *Teague* makes it clear that finality marks the cutoff for compiling the proper body of this Court's case law for that inquiry.

Viewed holistically and in context, the part of the *Williams* opinion that Justice O'Connor wrote comports with this conclusion. That part states that any decision from this Court that "would qualify as

an old rule under [this Court's] *Teague* jurisprudence will constitute 'clearly established Federal law'" under AEDPA. *Williams*, 529 U.S. at 412. To be sure, Justice O'Connor also added that "clearly established Federal law" refers to "the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* But the point of that passage was to fend off any suggestion (*see, e.g., Carey v. Musladin*, 549 U.S. 70, 78-79 (2006) (Stevens, J., concurring in the judgment)) that *dicta* could count as "clearly established" law. There is no indication that Justice O'Connor meant to diverge from the explanation respecting AEDPA's temporal cutoff that she offered in the earlier part of her opinion and the formulation the Court offered in the part of the opinion that Justice Stevens delivered (which she herself joined). After all, it may not have been clear to someone focused on some other aspect of AEDPA – as this Court's Justices were in *Williams* – that the two temporal formulations might lead to divergent results. *Cf. Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 531, 542 (2005) ("On occasion, [an incorrect] doctrinal rule or test finds its way into our case law" by way of "regrettably imprecise" language in an opinion focused on a different issue.).

2. The Third Circuit's holding not only contravenes statutory text, structure, and precedent; it also subverts constitutional values.

a. The Third Circuit's rule would undermine this Court's holding in *Griffith v. Kentucky*, 479 U.S. 314 (1987). There, this Court held that "basic norms of constitutional adjudication" entitle individuals whose convictions are not yet final to the benefit of new

opinions from this Court. *Id.* at 322, 328. *Griffith* is grounded in the fundamental principle of "treating similarly situated defendants the same." *Id.* at 323. If this Court selects one defendant's case and establishes a new rule of criminal procedure, other defendants who are simultaneously making similar arguments on direct appeal should also get the benefit of that new rule.

But as the First Circuit has explained, fixing the cutoff for clearly established law at the time of a state intermediate court decision would "subvert *Griffith*" by allowing state supreme courts to "deny criminal defendants the benefit of new Supreme Court precedent by the simple expedient of" denying review. *Foxworth*, 570 F.3d at 432. Indeed, the Third Circuit's rule "would give state courts a perverse incentive to avoid addressing constitutional claims in contemporaneous terms while insulating their actions from subsequent federal habeas review." *Id.*

b. The Third Circuit's construction of AEDPA also would raise a serious issue under the Suspension Clause, U.S. Const. art. I, § 9, cl. 2. The availability of habeas corpus has evolved, and generally expanded, since 1789. Over 140 years ago, Congress first extended the Great Writ to state prisoners. And ever since *Teague*, it has been clear that the writ guarantees state prisoners the benefit of any decisions that this Court announces before their convictions became final.

In light of this legal evolution and the settled expectations it has created, this Court "has been careful not to foreclose the possibility that the protections of the Suspension Clause have expanded along with post-1789 developments that define the

present scope of the writ." *Boumediene v. Bush*, 553 U.S. 723, 746 (2008). Indeed, in *Felker v. Turpin*, 518 U.S. 651 (1996), this Court assumed, in an opinion written by Chief Justice Rehnquist, that "the Suspension Clause of the Constitution refers to the writ as it exists [for state prisoners] today, rather than as it existed in 1789." *Id.* at 663-64.

If the Third Circuit's construction of AEDPA were correct, however, it would preclude state prisoners from obtaining habeas relief even in cases where it became clear while they were still on direct review in state court that the state-court proceedings had violated their federal constitutional rights. This result would force the issue of whether the Suspension Clause protects the longstanding availability of habeas relief from statutory infringement. "The necessity of resolving such a serious and difficult constitutional issue – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent" before holding that Congress has curtailed the scope of federal habeas law. *INS v. St. Cyr*, 533 U.S. 289, 305 (2001). No such clarity is present here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 12, 2010

APPENDIX

APPENDIX A[*]

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2163

ERIC GREENE
also known as
JARMAINE Q. TRICE

v.

JOHN A. PALAKOVICH; THE DISTRICT ATTORNEY OF THE PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Eric Greene,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-04-cv-05200)
District Judge: The Honorable Clifford Scott Green

Argued March 8, 2010

Before: AMBRO, SMITH, and MICHEL,* *Circuit Judges*

(Filed: May 28, 2010)

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[*] This Appendix incorporates the three minor typographical changes that the Third Circuit in an Order dated July 22, 2010. That order is reproduced in its entirety in Appendix B.

* The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, sitting by designation.

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OPINION

SMITH, *Circuit Judge.*

Eric Greene petitioned for relief under 28 U.S.C. § 2254 from his state court convictions for second degree murder, robbery, and conspiracy. This appeal requires us to resolve the thorny question of what the temporal cutoff is for determining "clearly established Federal law" for purposes of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") standard of review, set forth in 28 U.S.C. § 2254(d)(1). Based on the statute's text and Supreme Court precedent, we now hold that "clearly established Federal law" should be determined as of the date of the relevant state-court decision. Because the Supreme Court decision that Greene wishes to rely upon in his habeas petition, *Gray v. Maryland*, 523 U.S. 185 (1998), had not yet been decided at the time of the relevant state-court decision, he cannot show that his state court proceedings resulted in an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1). Thus, we will affirm the judgment of the District Court denying Greene's habeas petition.

I.

The Crime

In early December of 1993, three or four men robbed a small family owned grocery store in North Philadelphia, and its owner, Francisco Azcona, died after being shot at point-blank range. When the robbers were unable to open the cash register, they picked it up and carried it out of the store, escaping in a station wagon parked nearby. A week after Mr. Azcona's murder, Greene, Julius Jenkins, Atil Finney, and Gregory Womack robbed a check cashing facility. They were apprehended shortly thereafter and the police seized a firearm. Through ballistics testing, the police determined that the seized firearm was used in Mr. Azcona's murder. With this evidence, the police were able to make progress in the murder investigation.

The Investigation

In late February of 1995, Detective Robert Snell of the Philadelphia Police Department questioned Demond Jackson about his involvement in Mr. Azcona's murder. Jackson admitted that he was in the station wagon parked outside of the grocery store the night of the murder, but he claimed that he was simply getting a ride to West Philadelphia when the others stopped at the store. He described how several of them went inside and committed the murder. He also identified Jenkins as the shooter, and indicated that Naree Abdullah carried the cash register out of the store. According to Jackson, Finney entered the store with Jenkins and Abdullah, while Greene remained with the driver and Jackson in the automobile. Jackson added that the proceeds of the

robbery were split among only five of the men, and that he did not take a share of the proceeds.

Armed with the information from Jackson, Detective Michael Gross of the Philadelphia Police Department questioned Finney in early March of 1995. Finney gave a statement to the police in which he admitted that he was one of the participants in the grocery store robbery and that he was inside the store at the time of the robbery. He identified Jenkins as the shooter, implicated Greene as the robber who carried the cash register out of the store, indicated that Womack had driven the station wagon, and stated that another individual was involved in the robbery. Although Finney initially stated that five people were involved in the robbery, he later noted that there were six people in the car. A few days later, Detective Joseph Walsh of the Philadelphia Police Department questioned Womack. Womack gave a statement to the police in which he admitted he was the driver of the station wagon the night that Jenkins killed Mr. Azcona. In addition, he implicated Finney, Abdullah, and Greene in the robbery.

Shortly after these statements were obtained, first degree murder charges were filed against Jenkins. Greene, Finney, Womack, and Abdullah were charged with, *inter alia*, second degree murder, three counts of robbery, and conspiracy.

The Trial

Greene filed a pretrial motion seeking severance on several grounds. In that motion, he argued, *inter alia*, that a joint trial with his codefendants would be prejudicial because of the incriminating statements they had made to authorities. As support for his

motion, Greene cited *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). During a pretrial hearing, Greene urged the trial court, the Court of Common Pleas of Philadelphia, to sever the trials because the statements of some of his non-testifying codefendants implicated him and identified him as the person who carried the cash register out of the grocery store. The trial court, recognizing that the statements might be inadmissible at a joint trial, but also noting that redaction might resolve any problem of prejudice, posed a hypothetical to the parties:

> Judge: It's unusual to do this, but suppose the statement is redacted to say, "I didn't take the cash register." In other words, each defendant's statement would state–
>
> [Greene's Counsel]: I didn't take it.
>
> Judge: I didn't. Someone else took the cash register.
>
> [Greene's Counsel]: There's another nuance that I want Your Honor to know because your suggestion is brilliant. I just want to factor in one more thing. Of the three co-defendants who gave statements, indeed, Atil Finney says that my client took the cash register and Mr. Gregory Womack made the statement that my client was involved in that, but believe it or not, Julius Jenkins says that someone entirely different – he says that either Naree or another person . . . took the cash

> register, either Womack or Naree, so you have Mr. Jenkins saying specifically that one of two other people took it – people involved, I might add, but not [Greene].

In response, the Court declared that the statements were not interlocking and inquired how the conflicting statements "pin point[ed]" Greene since the jury would have "information that three different people have been named as having taken the cash register." Greene's counsel replied that the Court's analysis was "excellent," but wondered how the Commonwealth would redact the statements. The Court replied that "it seems to me that the fair way to redact these [statements] is to refer to three different people." Greene's counsel responded: "As long as I would be allowed to argue in my closing speech that you heard what you heard and you heard that there were different people, then I would have no problem with [it]." The prosecutor offered to redact the statements so that "not one specific person carries out the cash register." Greene's counsel agreed that, under *Bruton*, such a redaction would remove any prejudice from the statements. Greene's counsel also pressed, without success, an additional basis for severance: that Jenkins, who would be tried alongside Greene, was facing a capital murder charge.

Greene's trial was held in February of 1996. At trial, Mr. Azcona's wife and sister-in-law identified Jenkins as the shooter, but they were unable to identify any of the other robbers in the store or to state with certainty whether there were three or four men involved in the robbery.

Jackson, who had not been charged with any crimes associated with the robbery, was the prosecution's star witness. His testimony differed significantly from his statement to Detective Snell. Jackson testified that all of the occupants of the station wagon went into the store except for him and Womack. Contrary to his earlier statement that Abdullah picked up the cash register, Jackson testified that Greene took the cash register from the store. Jackson was cross-examined extensively on the differences between his earlier statement and his trial testimony. In addition, Greene attacked Jackson's credibility by highlighting that Jackson was present in Womack's station wagon but had not been charged with any crimes related to the robbery and that Jackson had outstanding drug charges.

The Commonwealth also called Detectives Gross and Walsh to testify about the statements they obtained from Finney and Womack. Neither Greene nor his codefendants objected to the reading of those statements in redacted form. Detective Gross read Finney's redacted statement, which substituted the nicknames or proper names of Finney's codefendants with the phrases "this guy," "other guys," and "two guys." The redacted statement also used the neutral pronouns "we" or "someone" in certain instances. For example, Finney's initial description of the robbery in its redacted form read:

> We were riding around in this, this guy's car, me and three other guys were in the North Philadelphia. We – when one said let's get paid. Everyone said okay and we saw this store. So me and two guys went in the store. When we

> got inside two guys stayed up front and I stayed to the back. One guy had his gun on the guy and was at the cash register getting the money, but it wouldn't open. I heard a shot and looked over. Blood was coming out of the guy's mouth. After that someone grabbed the register and we all ran out.

In at least one instance, when Detective Gross reached a portion of the statement where Finney was asked to identify "these guys" by their full names, the redaction simply deleted the names. The redacted answer stated: "One is and the other is." Later in the statement, when Finney was asked if he recognized anyone in certain photographs, the redacted answer stated: "Number three is. Number six is. Number eight is." The redacted statement also replaced the names of certain defendants with the word "blank" on four occasions. During Detective Gross's reading of the redacted statement, the trial court instructed the jury that Finney's statement could only be considered as evidence against him and not as evidence against any other defendant.

Detective Walsh, during his testimony, read a redacted version of Womack's statement. In it, Womack declared:

> It was me and another guy. We were in the car, the other three went in the store. The car was around the corner and then they came out of the store carrying a cash register. As we pulled off the shooter said he shot the guy. I think someone asked him why did he shoot the guy? He didn't answer him. Then we drove up our neighborhood. Then we drove to someone's and

> we opened the register and got the money and we took the register and dumped it in a trash dumpster in a townhouse.

Although the redacted statement utilized neutral references such as "guy," "another guy," "someone," "someone else," "one," and "others," it replaced the names of some of the codefendants with the word "blank" on three occasions. The trial court did not give a limiting instruction following the reading of Womack's redacted statement, and neither Greene nor any of his codefendants requested such an instruction.

After closing arguments, the trial court issued a limiting instruction directing the jurors not to consider either redacted statement as evidence against any defendant other than the declarant. The jury found Greene guilty of second degree murder, three counts of robbery, and one count of conspiracy. The trial court sentenced him to life imprisonment.

Subsequent Procedural History

Greene filed a direct appeal with the Pennsylvania Superior Court. Citing *Bruton*, Greene argued that his trial should have been severed from that of his codefendants because the statements implicating him "were not suitable for redaction." On December 16, 1997, the Pennsylvania Superior Court affirmed the judgment against Greene, addressing his *Bruton* claim on the merits. The Court observed that the statements that were admitted into evidence "were redacted to remove any reference to the other defendants in the case" and "[t]he trial court instructed the jury on more than one occasion that such statements could only be considered as evidence

against the defendants who made them." In light of these observations, the Pennsylvania Superior Court concluded that *Bruton* was not violated and that Greene was not deprived of his right to confrontation.

Greene filed a timely petition for allowance of appeal with the Pennsylvania Supreme Court. His petition argued, *inter alia*, that he had been deprived of his rights under the Confrontation Clause by the introduction of Womack's and Finney's statements. As support for his position, Greene again cited *Bruton*. While Greene's petition for allowance of appeal was pending with the Pennsylvania Supreme Court, the United States Supreme Court issued its decision in *Gray*. In *Gray*, the Supreme Court stated that "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." 523 U.S. at 195. Thereafter, the Pennsylvania Supreme Court granted Greene's petition for allocatur "limited to the issue of whether the common pleas court erred by denying the motion for severance thereby resulting in the violation of [Greene]'s Sixth Amendment right of confrontation upon the admission of statements given by his nontestifying codefendants." *Commonwealth v. Trice*, 713 A.2d 1144 (Pa. 1998). After granting the petition for allocatur, however, the Pennsylvania Supreme Court dismissed Greene's appeal as improvidently granted. *Commonwealth v. Trice*, 727 A.2d 1113 (Pa. 1999). Greene's conviction became final ninety days later, on July 28, 1999, when the time period for filing

a petition for certiorari to the United States Supreme Court expired. *See Kapral v. United States*, 166 F.3d 565, 570-71 (3d Cir. 1999).

In early August of 1999, Greene sought relief from his conviction based on Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. §§ 9541-9546. In his PCRA petition, Greene argued that the trial court abused its discretion in denying the severance motion, and cited, *inter alia*, the prosecutor's summation, which allegedly improperly informed the jury that Finney's statement corroborated that the others on trial were implicated in the commission of the crime. The PCRA petition did not assert a Confrontation Clause claim as it failed to reference the redacted statements or to cite the Supreme Court's decisions in *Bruton*, *Marsh*, or *Gray*. The trial court dismissed Greene's PCRA petition as frivolous. Greene, acting pro se, appealed the denial of his PCRA petition to the Pennsylvania Superior Court, asserting that the trial court erred by refusing to grant a severance. His argument cited only Pennsylvania authority regarding motions to sever multiple criminal charges. He did not refer to the Confrontation Clause, *Bruton*, *Marsh* or *Gray*. On December 31, 2003, the Pennsylvania Superior Court affirmed the dismissal of Greene's PCRA petition, noting that the severance claim had been finally litigated and could not afford him collateral relief. Greene filed another petition for allowance of appeal with the Pennsylvania Supreme Court, which denied allocatur.

This timely § 2254 petition followed. In his petition, Greene asserted, *inter alia*, that his trial should have been severed "due to antagonistic

defenses, due to the fact a codefendant was subjected to the death penalty even though petitioner was not, and particularly due to the fact that effective redaction of the codefendant's [sic] statements, though attempted, was polluted by gross prosecutorial misconduct." In a comprehensive report, the Magistrate Judge to whom the petition had been referred recommended that Greene's petition be dismissed, but that a certificate of appealability be granted on the Confrontation Clause claim arising out of the introduction of Womack's and Finney's redacted statements at trial.

The Magistrate Judge struggled with whether to determine the "clearly established Federal law" under § 2254(d)(1) as of the date of the relevant state-court decision, as instructed by Justice O'Connor in her portion of the majority decision in *Williams v. Taylor*, 529 U.S. 362, 403-412 (2000), or by the date Greene's conviction became final, as instructed by Justice Stevens in his portion of the majority decision in *Williams*, *id.* at 390. This issue was significant because it determined whether "clearly established Federal law" for purposes of Greene's § 2254 petition included the Supreme Court's decision in *Gray*. If the cutoff date was the date of the relevant state-court decision, *i.e.*, the Pennsylvania Superior Court's December 16, 1997 decision affirming Greene's convictions on direct appeal, that date preceded the Supreme Court's decision in *Gray*, and *Gray would not* be part of the "clearly established Federal law" applicable to this habeas petition.[1] But if the date

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[1] We recognize that the Pennsylvania Supreme Court granted allocatur for Greene's appeal, which raised the Confrontation

Greene's convictions became final, July 28, 1999, was the pertinent cutoff date, *Gray*, which was issued more than a year earlier on March 9, 1998, *would* be "clearly established Federal law."

The Magistrate Judge ultimately determined that the controlling date for ascertaining the "clearly established Federal law" for Greene's habeas petition was the date of the relevant state-court decision. Accordingly, the Magistrate Judge applied the Supreme Court law existing at the time of the Pennsylvania Superior Court's December 16, 1997 decision, *Bruton* and *Marsh*, to determine whether Greene's § 2254 petition merited relief. He concluded that the Pennsylvania Superior Court did not

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Clause claim and cited *Gray*, but then dismissed that appeal as having been improvidently granted. That dismissal cannot be treated as the relevant state-court decision, however, because it had no precedential value:

> In the circumstance where [the Pennsylvania Supreme Court has] accepted an issue by granting allowance of appeal, and [it], after conducting . . . review of the issue, enters an order dismissing the appeal as having been improvidently granted, the effect is as though [it] never granted allowance of appeal. In other words, a dismissal as being improvidently granted has the exact same effect as if [it] had denied the petition for allowance of appeal (allocatur) in the first place. Where we dismiss an appeal as improvidently granted, the lower tribunal's opinion and order stand as a decision of that court and this Court's order has no precedential value.

Commonwealth v. Tilghman, 673 A.2d 898, 904 (Pa. 1996) (emphasis omitted). Accordingly, even though there may have been some consideration of Greene's arguments by the Pennsylvania Supreme Court, there was no adjudication on the merits. Thus, the Pennsylvania Superior Court decision on direct appeal is the relevant state-court decision.

unreasonably apply *Bruton* and *Marsh* in concluding that the redacted statements did not violate the Confrontation Clause and recommended that the District Court deny the § 2254 petition.

The Commonwealth objected to the Magistrate Judge's report, arguing that Greene had not procedurally exhausted his Confrontation Clause claim. The District Court overruled the Commonwealth's objections, noting that Greene presented a general claim regarding the redacted confessions and relied upon relevant Supreme Court authority, *Bruton* and *Marsh*. The District Court adopted the Magistrate Judge's report and recommendation. The Court denied the petition, but also granted a certificate of appealability limited to Greene's Confrontation Clause claim.[2]

II.

Before us, the Commonwealth argues that Greene did not satisfy the fair presentation requirement because he consented to the redactions in the trial court and did not fairly present his Confrontation Clause argument to the Pennsylvania Superior Court.[3]

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[2] The District Court exercised jurisdiction under 28 U.S.C. §§ 2241 and 2254, and we have jurisdiction under 28 U.S.C. §§ 1291 and 2253.

[3] In *Picard v. Connor*, 404 U.S. 270, 275 (1971), the Supreme Court declared that "once the federal claim has been fairly presented to the state courts, the exhaustion requirement is satisfied." It follows, therefore, that our review of whether a habeas petitioner has fairly presented his federal claim to the state courts is subject to the same standard of review that we employ in determining whether a habeas petitioner has exhausted his state court remedies. Accordingly, the question of whether Greene fairly presented his claim to the state courts is

It submits that Greene only raised the Confrontation Clause argument in his direct appeal to the Pennsylvania Supreme Court. We disagree.

The fair presentation requirement arises from the exhaustion doctrine pertaining to federal habeas review of state court decisions. *Picard v. Connor*, 404 U.S. 270, 275 (1971). Fair presentation requires giving the state court the "first opportunity to hear the claim sought to be vindicated in [the] federal habeas proceeding[.]" *Id.* at 276. In this first opportunity, the habeas petitioner need merely "present [the] federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted." *McCandless v. Vaughn*, 172 F.3d 255, 261 (3d Cir. 1999). In other words, the claims raised in the state courts must be substantially equivalent to the claim pressed in the federal court. *Doctor v. Walters*, 96 F.3d 675, 678 (3d Cir. 1996), *abrogated on other grounds by Beard v. Kindler*, __ U.S. __, 130 S. Ct. 612 (2009).

Greene fairly presented the factual and legal substance of his Confrontation Clause claim to the Pennsylvania state courts. On direct appeal, Greene presented his Confrontation Clause claim and the Pennsylvania Superior Court addressed the merits of that claim on the "basis of its substance, rather than on a procedural, or other ground." *Thomas v. Horn*, 570 F.3d 105, 115 (3d Cir. 2009) (citations omitted). Thus, Greene's direct appeal satisfied the fair presentation requirement. *Picard*, 404 U.S. at 275.

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subject to plenary review. *See Ellison v. Rogers*, 484 F.3d 658, 660 (3d Cir. 2007).

III.

Having determined that Greene fairly presented his Confrontation Clause claim in the Pennsylvania state courts, we turn to a vexing issue that has, for the most part, evaded analytical discussion by the Supreme Court and the Courts of Appeals.[4] That is, whether "clearly established Federal law" under 28 U.S.C. § 2254(d)(1) is determined based on the "time of the relevant state-court decision," *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court), the "time [the] state-court conviction became final," *id.* at 390 (Stevens, J., for the Court), or some combination thereof, *e.g.*, *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam) (holding that "in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* [*v. Lane*, 489 U.S. 288 (1989),] analysis when the issue is properly raised by the state"). The Supreme Court, until recently, appeared to have settled on the date of the relevant state-court decision.[5] But the use of the date the petitioner's

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[4] "Since the District Court ruled on [Greene's] habeas petition without an evidentiary hearing, our review of its decision is plenary." *Thomas v. Horn*, 570 F.3d 105, 113 (3d Cir. 2009). We exercise plenary review over issues of statutory interpretation. *United States v. Lnu*, 575 F.3d 298, 300 (3d Cir. 2009)

[5] *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003) (O'Connor, J., joined by Rehnquist, C.J., and Stevens, Kennedy, Souter, Ginsburg, and Breyer, JJ.) (stating that AEDPA "require[s] us to limit our analysis to the law as it was 'clearly established' by [Supreme Court] precedents at the time of the state court's decision"); *but see Carey*, 549 U.S. at 78 (Stevens, J.,

conviction became final has refused to quietly exit the stage. In recent months, the Supreme Court has noted the "uncertainty" surrounding the meaning of "clearly established Federal law" for the purposes of § 2254(d)(1). *Smith v. Spisak*, __ U.S. __, 130 S. Ct. 676, 681 (2010) (assuming that Supreme Court decision that was issued after the state supreme court affirmed petitioner's conviction, but before the date petitioner's conviction became final, constituted "clearly established Federal law"); *see id.* at 689 n.2 (Stevens, J., concurring) (supporting date conviction became final); *see also Thaler v. Haynes*, __ U.S. __, 130 S. Ct. 1171, 1174 n.2 (2010) (per curiam) (noting in dicta that a certain case could not have constituted "clearly established Federal law" because the case was "decided . . . nearly six years after [petitioner's] conviction became final and more than six years after the relevant state-court decision"); *see Brown v. Greiner*, 409 F.3d 523, 533 n.3 (2d Cir. 2005) (noting uncertainty caused by "inconsistent guidance" from the Supreme Court); *Newland v. Hall*, 527 F.3d 1162, 1198 n.62 (11th Cir. 2008) (noting uncertainty); *but see Foxworth v. St. Amand*, 570 F.3d 414, 430-32 (1st Cir. 2009) (declaring relevant state-court decision approach "untenable" and stating that Supreme Court precedent leads to the "inexorable conclusion" that the date the conviction became final is the correct approach).[6]

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concurring) (rejecting Justice O'Connor's formulation of "clearly established Federal law"); *Horn v. Banks*, 536 U.S. 266, 272 (2002).

[6] The uncertainty identified by the Supreme Court is present throughout our own admittedly contradictory § 2254(d)(1)

After careful consideration of the divergent approaches to determining what constitutes "clearly established Federal law" under § 2254(d)(1), we now hold that the date of the relevant state-court decision is the controlling date. After surveying the questions that arise from the Supreme Court's *Williams* decision, and considering the statutory text and post-*Williams* Supreme Court precedent, our view is that using the date of the relevant state-court decision to determine "clearly established Federal law" is the most logical approach to applying § 2254(d)(1).

A.

It is understandable that confusion surrounds what constitutes "clearly established Federal law." In discussing the meaning of the AEDPA amendments, the Supreme Court has held that the "statutory phrase ['clearly established Federal law'] refer[red] to the holdings, as opposed to the dicta, of [its] decisions *as of the time of the relevant state-court decision.*" *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court) (emphasis added). It has also held that all Supreme Court jurisprudence that would qualify as an old rule under [its] *Teague* jurisprudence w[ould] constitute

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jurisprudence. We have followed the "relevant state-court decision" approach without much fanfare in numerous cases. *E.g.*, *McMullen v. Tennis*, 562 F.3d 231, 236 (3d Cir. 2009); *Warren v. Kyler*, 422 F.3d 132, 138 (3d Cir. 2005); *Gibbs v. Frank*, 387 F.3d 268, 272 (3d Cir. 2004). We have also used the date the petitioner's conviction became final. *E.g.*, *Fischetti v. Johnson*, 384 F.3d 140, 148 (3d Cir. 2004). Indeed, it is not clear from our jurisprudence whether we recognized these divergent approaches because those cases did not require us to resolve whether the cutoff date was the relevant state-court decision date or the date the conviction became final.

'clearly established Federal law . . . ' under § 2254(d)(1)." *Id.*

These statements from Justice O'Connor present the first area of confusion in *Williams*. The most logical meaning for the term "old rule," a term that lacks any meaningful discussion post-*Williams*, is any rule which is not "new" under *Teague*. *See Teague*, 489 U.S. at 300-01 (plurality opinion). If that is the case, then an "old rule" is any rule that was "dictated by the governing precedent existing at the time when [the petitioner's] conviction became final[.]" *Whorton v. Bockting*, 549 U.S. 406, 417 (2007) (defining new rule). In that event, the inclusion of old rules under *Teague* as "clearly established Federal law" would include Supreme Court decisions issued after the relevant state-court decision but before the petitioner's conviction became final. Such an outcome, in our view, contradicts Justice O'Connor's initial declaration that "clearly established Federal law" should be determined based on the date of the relevant state-court decision.[7]

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[7] At least one of our sister circuits sees no contradiction in Justice O'Connor's statements. In *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), the First Circuit concluded that *Williams* did not require the use of the "last reasoned state-court decision" to determine "clearly established Federal law" and endorsed the use of the date the petitioner's conviction became final. *Id.* at 431. That Court believed that Justice O'Connor expressly approved the use of *Teague* for determining "clearly established Federal law":

> Close perscrutation of *Williams* discloses nothing in the Court's constituent opinions that indicates any intention on Justice O'Connor's part either to modify or to undercut the bright-line rule of *Teague v. Lane*, 489 U.S. 288, 310 . . . (1989) (effectively limiting the consideration of new

> constitutional rules of criminal procedure in cases on collateral review to those rules announced before the petitioner's conviction became final).
>
> The opposite is true. Justice O'Connor's opinion stated that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1)." 529 U.S. at 412. That is a frank recognition that the AEDPA has neither altered nor eroded the marker laid down by *Teague*. This recognition is fully consistent with Part III of Justice Stevens's lead opinion, joined by Justice O'Connor; there, Justice Stevens stated that "[t]he threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became *final*." *Williams*, 529 U.S. at 390 (emphasis supplied).

Foxworth, 570 F.3d at 431. Based on this observation, the First Circuit concluded that "*finality*, not the date of the last reasoned decision, is the principal determinant of whether a 'new' rule can be applied to an 'old' case." *Id.* "Finality means that 'a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [filed and] finally denied.'" *Id.* (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987)).

It cannot be denied that Justice O'Connor's approach, in light of her reference to old rules under *Teague*, can be read to permit the use of the date the conviction became final. That being said, the portion of the *Williams* decision referencing old rules under *Teague* has largely fallen by the wayside in post-*Williams* Supreme Court decisions, *see infra* Section III(C). Moreover, the *Foxworth* Court's assertion that Justice O'Connor decisions, *see Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (stating that "*Teague* . . . was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings"), not a presumption of malfeasance by state courts. To assume the latter defeats one of the main purposes of the *Teague* rule, to respect the finality of state-court convictions. If

state courts cannot be trusted to properly adjudicate claims, then we would have no need to respect the resulting decisions.

The *Foxworth* Court also suggested that using the date of the last relevant state-court decision would "subvert *Griffith* and deny criminal defendants the benefit of new Supreme Court precedent by the simple expedient of summarily affirming a lower court's decision." *Foxworth*, 570 F.3d at 432. It would also, according to the First Circuit, "give state courts a perverse incentive to avoid addressing constitutional claims in contemporaneous terms while insulating their actions from subsequent federal habeas review." *Id.* We disagree. The suggestion that a state appellate court would summarily affirm the judgment of a lower state court in an effort to undermine an individual's potential federal habeas petition is baseless. Moreover, the *Teague* rule itself, the rule that the First Circuit endorses, is premised on comity and respect for state court decisions, *see Danforth v. Minnesota*, 552 U.S. 264, 280 (2008) (stating that "*Teague* . . . was fashioned to achieve the goals of federal habeas while minimizing federal intrusion into state criminal proceedings"), not a presumption of malfeasance by state courts. To assume the latter defeats one of the main purposes of the *Teague* rule, to respect the finality of state-court convictions. If state courts cannot be trusted to properly adjudicate claims, then we would have no need to respect the resulting decisions.

More generally, we are unpersuaded by the First Circuit's robust support for Justice Stevens's approach. In our view, there is no clear answer to the issue we face. According to the *Foxworth* Court, though, interpreting § 2254(d)(1) to require the use of the date of the relevant state-court decision is simply "untenable," 570 F.3d at 431, as in "not able to be defended," *Merriam-Webster's Collegiate Dictionary* 1373 (11th ed. 2003). We cannot agree with that characterization. *See infra* Sections III(B) and (C). If *Griffith* truly "remove[d] *any* vestige of doubt," 570 F.3d at 431 (emphasis added), and *Teague* and *Griffith* together "le[d] to the *inexorable* conclusion," *id.* at 432 (emphasis added), that the date the petitioner's conviction became final is the correct date, why then, has the Supreme Court expressed uncertainty in its recent decisions? *See Spisak*, 130 S. Ct. at 681; *see also Thaler*, 130 S. Ct. at 1174 n.2. Perhaps the resolution of

To further complicate *Williams*, the Supreme Court also held that the "threshold question under AEDPA is whether [a petitioner] seeks to apply a rule of law that was clearly established *at the time of his state-court conviction became final*." *Williams*, 529 U.S. at 390 (Stevens, J., for the Court) (emphasis added).[8] Thus, the majority opinions of the Court, on their faces, offered differing interpretations of the "clearly established Federal law" language.

Supreme Court precedent after *Williams* has also raised questions. At least some post-*Williams* authority suggests that the *Teague* test and § 2254(d)(1) are distinct inquiries. *E.g.*, *Horn*, 539 U.S. at 272; *see Thaler*, 130 S. Ct. at 1174 n.2. The instances where both tests must be met, however, are unclear.[9] More importantly, it is also unclear whether the distinct nature of the two inquiries has any impact on how we approach the meaning of "clearly established Federal law" for the purposes of § 2254(d)(1).

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this issue by the Supreme Court would be a simple task, but resolution of the issue in the Courts of Appeals based on existing Supreme Court precedent is akin to trying to piece together a jigsaw puzzle that has been sprinkled with pieces from other puzzles. All the pieces, no matter how they are arranged, simply do not fit.

[8] Justice Stevens's reliance on the date the petitioner's conviction became final appears to be based on his position that § 2254(d)(1) codified *Teague*. *See Williams*, 529 U.S. at 380.

[9] At a minimum, when the state properly raises *Teague*, the federal court must conduct the *Teague* analysis. *Horn*, 539 U.S. at 272. Notably, the Commonwealth did not raise *Teague* in this case.

In sum, we have (1) Justice O'Connor's majority opinion in *Williams*, which seems to contradict itself by stating that the date of the relevant state-court decision is the operative date for determining "clearly established Federal law" while simultaneously stating that Supreme Court jurisprudence that would qualify as "old rules" under *Teague* (which relies on the date the petitioner's conviction became final) is also "clearly established Federal law," (2) Justice Stevens's majority opinion in *Williams*, which contradicts Justice O'Connor's directive that we should look to the date of the relevant state-court decision, and (3) post-*Williams* Supreme Court authority suggesting that *Teague* and § 2254(d)(1) are distinct inquiries subject to independent analysis under certain circumstances.

While many courts have managed to avoid confronting these issues, *e.g.*, *Spisak*, 130 S. Ct. at 681, this case presents us with the inescapable obligation to decide the cutoff date for determining "clearly established Federal law." Greene's petition turns on whether he may invoke *Gray*; without that decision he cannot obtain relief. *See infra* Section IV. Gray was decided on March 9, 1998. Thus, using the date of the relevant state-court decision, the Pennsylvania Superior Court's December 16, 1997 decision, *Gray* would not be "clearly established Federal law." But using the date Greene's conviction became final, July 28, 1999, *Gray* would be "clearly established Federal law." Indeed, Greene's case is the perfect storm of facts for resolving the issue of which date – the date of the relevant state-court decision or the date the state-court conviction became final – should be used for

determining "clearly established Federal law" for the purposes of § 2254(d)(1).

B.

The text of § 2254(d)(1) supports using the date of the relevant state-court decision for determining "clearly established Federal law." Section 2254(d)(1) is concerned with "decision[s]" that were "contrary to" or "unreasonable application[s]" of "clearly established Federal law":

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]

Id. The statute indicates that a "decision" results from a state court's adjudication "on the merits" of a claim. *Id.* In other words, the decision occurs when the state court has acted on the substance of a petitioner's claim. *See Thomas*, 570 F.3d at 115 (concluding that adjudicated on the merits" means that the state ruling resolved the claim "on the basis of its substance, rather than on a procedural, or other ground"). Thus, it is the state court's resolution of the petitioner's claim that must be "contrary to" or an "unreasonable application" of existing Federal law to justify granting habeas relief. 28 U.S.C. § 2254(d)(1); *see Newland*, 527 F.3d at 1199 (holding that "the highest state court

decision reaching the merits of a habeas petitioner's claim is the relevant state court decision").

Given that AEDPA is concerned with the review of the state court's decision on the merits of the petitioner's claim, the statute, read in the most straightforward fashion, requires that the relevant Federal law be "clearly established" at the time of that state-court *decision*. 28 U.S.C. § 2254(d)(1).[10] Reading the language plainly, "clearly established" contemplates that the law or precedent *existed* at the time of the state court's substantive resolution of the petitioner's claim. *Cf. United States v. Atiyeh*, 402 F.3d 354, 364 (3d Cir. 2005) ("Congress kn[o]w[s] how to use the past tense."). A state court cannot unreasonably apply a Supreme Court decision that did not exist at the time of its decision. *See Priester v. Vaughn*, 382 F.3d 394, 400 (3d Cir. 2004) (noting that the Pennsylvania Superior Court "did not act unreasonably in failing to predict the Supreme Court's decision in *Gray*"). The same is true for the "contrary to" prong of the statute.

C.

Supreme Court decisions after *Williams* further bolster our conclusion. In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court stated unequivocally that "'clearly established Federal Law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision." *Id.* at 71-72. The same

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[10] Notably, the phrase "clearly established Federal law" did not have any special meaning for federal habeas review prior to AEDPA and it bears no overt connection to any language used in *Teague*.

test was repeated in *Wiggins v. Smith*, 539 U.S. 510, 520 (2003), *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004), and *Carey v. Musladin*, 549 U.S. 70, 74 (2006). *Accord* 1-2 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure*, Fifth Edition § 2.4 (stating that the date for determining "clearly established Federal law" for § 2254 petitions is "the date of the state court decision"); 2-32 *id.* § 32.3 ("Section 2254(d)(1) limits federal review to legal rules that actually were *in effect* when the state court decided the case.").

The date the conviction became final, on the other hand, has not gained much traction in the Supreme Court. Aside from stating that *Teague* and § 2254(d)(1) are distinct inquiries, *Horn*, 536 U.S. at 272, and that in certain circumstances both *Teague* and § 2254(d)(1) must be satisfied, *id.*, the Supreme Court has not suggested that the date the conviction became final has any import in determining "clearly established Federal law" for the purposes of § 2254(d)(1). In fact, it appears that Justice Stevens's majority opinion language from *Williams* stating that the "threshold question" is whether the petitioner seeks to apply a rule that was clearly established at the time his state-court conviction became final, *Williams*, 529 U.S. at 390, has been supplanted by *Lockyer*, where the Supreme Court agreed that the "threshold matter" was to decide what constituted "clearly established Federal law," but then used the *relevant state-court decision date* to determine that law, 538 U.S. at 71. The most telling observation regarding the use of the date the conviction became final is that the strongest authorities we have found

for that approach are the recent Supreme Court opinions expressing uncertainty on which date is appropriate. *See Spisak*, 130 S. Ct. at 681; *see also Thaler*, 130 S. Ct. at 1174 n.2. Mere uncertainty cannot counterbalance the numerous Supreme Court decisions that have unequivocally, albeit without analysis, taken the other approach. As an inferior federal court, we are not free to ignore the numerosity of these pronouncements.

Moreover, it appears that Justice Stevens's primary concern with Justice O'Connor's formulation of the clearly established Federal law" inquiry is her view that the phrase "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions[.]" *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court). In *Carey*, Justice Stevens explained that he took issue with Justice O'Connor's formulation because it discouraged state courts from seeking guidance from the Supreme Court's decision on the grounds that such guidance was dicta:

> Virtually every one of the Court's opinions announcing a new application of a constitutional principle contains some explanatory language that is intended to provide guidance to lawyers and judges in future cases. It is quite wrong to invite state court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case. The text of [AEDPA] itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden's side of the scales.

Carey, 549 U.S. at 79 (Stevens, J., concurring) (citations omitted). This concern exists independent of the date upon which "clearly established Federal law" is determined and is not implicated in the issue we decide today. The decisions preceding *Gray* – *Bruton* and *Marsh* – explicitly refused to provide guidance on whether the teachings of *Bruton* applied to redactions like the ones made in this case. *See infra* Section IV.

In conclusion, we hold that the cutoff date for determining "clearly established Federal law" for purposes of § 2254(d)(1) is the date of the relevant state-court decision. Both the natural reading of the statutory text and post-*Williams* Supreme Court precedent support this conclusion. As such, *Gray* was not "clearly established Federal law" for the purposes of Greene's habeas petition.

D.

Before applying our holding to the facts in this case, a brief segue is needed to address our dissenting colleague's spirited defense of the use of the date the petitioner's conviction became final to determine "clearly established Federal law." While we recognize that the issue confronted today is one over which reasonable jurists may disagree, there are some notable deficiencies in the dissent's proposed adjudication of this case. The dissent (1) would *sub silentio* codify *Teague*, including its retroactivity exceptions, as part of § 2254 without any reasoned justification for doing so, (2) erroneously asserts that *Griffith v. Kentucky*, 479 U.S. 314 (1987), applies to cases on collateral review, and (3) incorrectly asserts that our approach to § 2254(d)(1) creates a "twilight zone," preventing a petitioner from relying on Supreme

Court decisions issued after the date of his last relevant state-court decision, but before his conviction becomes final.

1.

As already explained in Section III(A), there is direct Supreme Court precedent supporting the view that "whatever would qualify as an old rule under [the Supreme Court's] *Teague* jurisprudence will constitute 'clearly established Federal law, . . .' under § 2254(d)(1)" *Williams*, 529 U.S. at 412 (O'Connor, J., for the Court). But the dissent appears to go one step further. It alludes, at times, to the retroactive application of new rules that fall within the *Teague* exceptions for retroactivity as "clearly established Federal law" for the purposes of § 2254.[11]

As a preliminary observation, this case does not raise a *Teague* new rules retroactivity issue. Under *Teague*, *Gray* would be an old rule since it was issued before Greene's conviction became final. Thus, comments on the supposed benefits of *Teague*'s new rule retroactivity exceptions would be dicta even if we

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[11] "In *Teague*, [the Supreme Court] explained that unless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Horn*, 536 U.S. at 271 (internal quotation marks omitted). There are two exceptions to the general rule. "The first exception permits the retroactive application of a new rule if the rule places a class of private conduct beyond the power of the State to proscribe . . . or addresses a substantive categorical guarantee accorded by the Constitution[.]" *Id.* n.5 (internal quotation marks omitted). "The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* (internal quotation marks omitted).

were to take the dissent's approach. That being said, we caution that the use of *Teague*'s new rule retroactivity exceptions for purposes of § 2254, while not implausible, *see* 28 U.S.C. § 2254(e)(2)(A)(i) (contemplating retroactive applications of "new rule[s] of constitutional law"), *id.* § 2244(d)(1)(C) (same), has yet to gain support from the Supreme Court. In fact, in *Horn*, the Supreme Court explained that the "AEDPA and *Teague* inquiries are distinct." 536 U.S. at 272. As distinct inquiries, it is unclear whether *Teague*'s new rule retroactivity exceptions should be incorporated into § 2254 even if we were to adopt the use of the date the petitioner's conviction became final for determining "clearly established Federal law."

Indeed, the *Horn* decision recognized that satisfaction of § 2254(d) is the *minimum* required for a petitioner to receive habeas relief:

> While it is of course a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review set forth in 28 U.S.C. § 2254(d) ("an application . . . shall not be granted . . . *unless*" the AEDPA standard of review is satisfied (emphasis added)), none of our post-AEDPA cases have suggested that a writ of habeas corpus should automatically issue if a prisoner satisfies the AEDPA standard, or that AEDPA relieves courts from the responsibility of addressing properly raised *Teague* arguments.

Id. Thus, under *Horn*, if *Teague* is in play at all, it is as an additional concern on top of AEDPA's requirements codified in § 2254(d). *See id.* As such, it

seems a leap to assume that new rules that are deemed retroactive under *Teague* would be automatically deemed "clearly established Federal law" for purposes of § 2254(d)(1).

2.

The dissent's assertion that *Griffith* applies on collateral review cannot be reconciled with that decision's holding. In *Griffith*, the Supreme Court considered whether a certain decision "applie[d] retroactively to a federal conviction then pending on *direct review*." 479 U.S. at 320 (emphasis added). It held that a newly declared rule "for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on *direct review* or not yet final[.]" *Id.* at 328 (emphasis added). The principles animating *Griffith* were the ideas that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," *id.* at 322, and that courts should treat like cases alike, *id.* at 323.

The dissent, citing *Whorton*, seeks to take *Griffith*, a decision animated by constitutional principles pertaining to treating like cases alike on direct review, and apply it to collateral review. It sees *Whorton* as "explicitly" recognizing that *Griffith* applies to collateral review. Neither *Whorton* nor subsequent Supreme Court precedent support this view.

The language from *Whorton* upon which the dissent relies is far from explicit. *See* 549 U.S. at 416. The sole citation of *Griffith* was for the proposition that under the "*Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on

direct review." *Id.* Before assuming that the Supreme Court sought, without any additional discussion, to extend *Griffith* to collateral review, as the dissent suggests, a less novel understanding of the *Whorton* Court's reliance on *Griffith* should be considered. Namely, that *Griffith* was probably cited as general support for the propositions that "an old rule applies . . . on direct . . . review [and that] a new rule is generally applicable only to cases that are still on direct review." *Whorton*, 549 U.S. at 416. The sentence following the *Griffith* citation in the *Whorton* decision further confirms this understanding by explaining how new rules apply in collateral proceedings through citation to *Teague*, not *Griffith*. *Id.*

Subsequent Supreme Court precedent also belies the dissent's view that *Griffith* applies on collateral review. Approximately a year after *Whorton*, the Supreme Court, in *Danforth v. Minnesota*, 552 U.S. 264 (2008), stated that *Griffith* "defined the scope of constitutional violations that would be remedied on direct appeal." *Id.* at 275 n.11. It did so in the context of determining whether "*Teague* constrains the authority of state courts to give broader effect to new rules of criminal procedure than is required by that opinion." *Id.* at 266. Rather than holding that *Teague* applied to the state courts, like *Griffith*, 479 U.S. at 328, the Supreme Court reached the opposite conclusion. It held that the *Teague* decision did not control a state court's decisions on retroactivity. According to the *Danforth* Court, the *Teague* decision "limits the kinds of constitutional violations that will entitle an individual to relief on federal habeas, but does not in any way limit the authority of a state

court, when reviewing its own state criminal convictions, to provide a remedy for a violation that is deemed 'nonretroactive' under *Teague*." *Danforth*, 552 U.S. at 282. The Supreme Court emphasized that *Teague*, unlike *Griffith*, was based on the Court's "power to interpret the federal habeas statute." *Id.* at 278. Because "*Teague* is based on statutory authority that extends only to federal courts applying a federal statute, it cannot be read as imposing a binding obligation on state courts." *Id.* at 278-79. While *Griffith* is concerned with affording individuals on direct review their right to adjudication in accord with the Constitution, *Teague* is derived from language in the habeas statute permitting disposal of habeas petitions "as law and justice require[.]" *Id.* at 278 (citing 28 U.S.C. § 2243). Because their sources of authority are different – *Griffith*, the Constitution, and *Teague*, 28 U.S.C. § 2243 – and their motivations are different, *Griffith* cannot be imported wholesale into *Teague* without discussion. In short, we do not dispute that *Griffith* may somehow inform the Supreme Court's approach in applying *Teague*. We also do not dispute that a § 2254 petition may invoke *Griffith* where a petitioner was denied the application of relevant Supreme Court precedent on direct review. But *Griffith*, independently, does not control retroactivity for cases on collateral review.

The dissent also asserts that our approach creates a twilight zone for any petitioner who seeks to invoke Supreme Court decisions that fall between the date of the last relevant state-court decision and the date the petitioner's conviction became final. This assertion is incorrect. Our holding does not create a categorical

bar to a petitioner's reliance on Supreme Court decisions issued during any twilight zone period. Instead, we set forth a simple rule: the universe of "clearly established Federal law" that may be applied to a particular petitioner's § 2254 appeal is tied to the date of his last relevant state-court decision.

In this case, it was *Greene's decision* not to raise the Confrontation Clause claim in his PCRA petition that established December 16, 1997, as the date of the last relevant state-court decision on the merits.[12] This,

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[12] The dissent asserts that Greene would not have been able to raise his Confrontation Clause claim in a PCRA petition because the issue had been previously litigated on the merits by the Pennsylvania Superior Court. *See* Pa. Cons. Stat. § 9543(a)(3); *id.* § 9544(a). We disagree. "[T]he 'previously litigated' rule codified in § 9544(a) simply relieves Pennsylvania courts of the burden of revisiting issues which are res judicata." *Boyd v. Warden*, 579 F.3d 330, 369 (3d Cir. 2009) (en banc). The Pennsylvania Superior Court's decision on direct review held only that Greene's "right to confrontation as set forth in *Bruton*" was not violated. The Confrontation Clause claim presented in Greene's PCRA petition would have been based on *Gray*, a "discrete legal ground," *Commonwealth v. Collins*, 888 A.2d 564, 570 (Pa. 2005), for relief that was separate from the grounds set forth in *Bruton* and *Marsh*. *See Marsh*, 481 U.S. at 211 n.5 (stating that the Supreme Court "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun").

Unlike the comparatively loose fair presentation requirement for a § 2254 petition, which requires that the habeas petitioner need merely "present [the] federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted," *McCandless*, 172 F.3d at 261, the PCRA requirement that an issue not have been previously litigated "refers to the discrete legal ground raised and decided on direct review," *Collins*, 888 A.2d at 570. While raising *Bruton* on direct appeal to the Pennsylvania Superior Court was

sufficient to put the state courts on notice that a federal claim was being asserted, satisfying the fair presentation requirement, *McCandless*, 172 F.3d at 261, the Pennsylvania Superior Court's decision was limited to whether *Bruton* required that Greene have been granted a severance at trial. Thus, for purposes of the PCRA, that decision did not bear on whether *Gray*, "a discrete legal ground" that was not "decided on direct review," *Collins*, 888 A.2d at 570, would have provided Greene relief.

In addition, we do not consider the authorities cited by the dissent persuasive given the facts of this case. The dissent cites *Commonwealth v. Small*, 980 A.2d 549 (Pa. 2009), for the proposition that reliance on a "different case to support the original theory," *id.* at 569, of relief would not "change the fact that [an] issue was previously litigated," *id.* But that proposition was offered based on different factual circumstances. In *Small*, the petitioner was seeking to rely on United States Supreme Court authority that existed at the time of his direct appeal yet was not raised in that appeal to effectively re-argue an issue that was previously litigated on direct appeal. *Id.* The *Small* Court had no reason to view the issue as novel because the underlying United States Supreme Court authority existed at the time of the direct appeal. Here, *Gray* did not exist at the time of the Pennsylvania Superior Court's decision. As such, Greene would not be simply raising a theory or allegation in support of a discrete legal ground for relief that *existed* at the time of his direct appeal. Instead, he would be asserting a *new* discrete legal ground for relief based on previously unavailable United States Supreme Court precedent.

The dissent's reliance on *Commonwealth v. Washington*, 927 A.2d 586 (Pa. 2007), is similarly misplaced. There, the petitioner argued that *Gray*, which had been decided after his direct appeal to the Pennsylvania Supreme Court but before that court's decision became final, entitled him to relief under the PCRA. *Id.* at 608-09. The Pennsylvania Supreme Court found that the petitioner's Confrontation Clause claim had been previously litigated on the merits, but its conclusion was not based on the fact that it had already considered the petitioner's *Bruton* claim. *Id.* at 609. On direct review, the Court assumed *arguendo* that the petitioner's right to confrontation had been violated by the

in turn, shrank the universe of "clearly established Federal law" available to him for his § 2254 petition, relative to what that universe would have been had he pursued the Confrontation Clause claim at the PCRA

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use of the word "blank" in a redacted statement and then held that the error was harmless and did not prejudice him. *Id.* In other words, it assumed that the rule later set forth in *Gray* existed and held that, despite the violation of that rule, the petitioner could not receive relief. In its PCRA review, the Court took note of *Gray*, which supported the proposition of law it had already assumed on direct appeal, and concluded that it had already considered the substance of that claim on direct review. *Id.* As such, *Washington* does not support the dissent's view that *Gray* and *Bruton* raise the same issue for purposes of PCRA review.

Finally, we note that the PCRA's requirement that an issue not have been previously litigated is flexibly applied by the Pennsylvania courts to avoid injustice, not create it. The Pennsylvania legislature, "by its effort to channel the broadest category of post-conviction claims into the statutorily-prescribed procedures . . . implemented a scheme that must necessarily be deemed to take into account facets of traditional habeas corpus jurisprudence . . . under which previous litigation does not function as a never-yielding bar to the possibility of collateral relief." *Commonwealth v. Cruz*, 851 A.2d 870, 877 (Pa. 2004) (citations omitted). "[I]n . . . instances involving unique circumstances embodying manifest error or irregularity in the chain of previous litigation, th[e] [Pennsylvania Supreme] Court and others have found that the doctrine need not be regarded as dispositive on collateral review." *Id.* Thus, even if we credit the dissent's view that Greene's issue was previously litigated, his PCRA petition was not doomed from its outset. The Pennsylvania Supreme Court's dismissal of Greene's petition as improvidently granted on direct review, in combination with the United States Supreme Court's issuance of the *Gray* decision, could be the kind of "irregularity in the chain of previous litigation," *id.*, that would merit relaxation of the requirement that an issue not have been previously litigated.

stage and obtained a later, post-*Gray* state-court decision on the merits. It is unfortunate for Greene that the body of "clearly established Federal law" as of December 16, 1997, did not include the *Gray* decision. Yet this is an outcome he could easily have avoided by raising the Confrontation Clause claim in his PCRA petition. Doing so would have pushed the date of the last relevant state-court decision on the merits forward, thereby expanding the universe of "clearly established Federal law" to include *Gray*.

Using the date of the last relevant state-court decision to determine "clearly established Federal law" gives defendants incentive to pursue all colorable claims based on "Federal law" as far as possible in the state courts because doing so will give them the best chance of success in federal habeas proceedings, not to mention the underlying state proceedings. This is a salutary effect that serves Congress's goals in passing AEDPA. *See* 28 U.S.C. § 2254(b) & (c) (requiring exhaustion of state court remedies); *Duncan v. Walker*, 533 U.S. 167, 181 (2001) (referencing "clear purpose to encourage litigants to pursue claims in state court prior to seeking federal collateral review").[13]

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[13] Notably, our approach does not create a *procedural* bar to Greene's claim. As explained in Section II, Greene satisfied the exhaustion requirement by fairly presenting his Confrontation Clause claim to the Pennsylvania Superior Court. Satisfaction of the exhaustion requirement, however, does not open the door to Supreme Court decisions issued after the last relevant state-court decision. The determination of what constitutes "clearly established Federal law" for purposes of § 2254 is a merits-based determination. Whether a petitioner has fairly presented and exhausted his claim in the state courts, in contrast, is a

IV.

Having concluded that *Gray* was not "clearly established Federal law," Greene is left to argue only *Bruton* and *Marsh*. Accordingly, we must determine whether the Pennsylvania Superior Court unreasonably applied those cases when it decided that the redactions of Finney's and Womack's statements did not violate Greene's rights under the Confrontation Clause.[14] In *Bruton*, the defendant challenged his conviction on the basis that his right to confront the witnesses against him was violated because the confession of his non-testifying codefendant, which directly implicated him, was introduced into evidence. 391 U.S. at 123. The Court of Appeals had affirmed the defendant's conviction because the jury had received a limiting instruction

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procedural issue that we decide independent of the merits of the petitioner's claim.

[14] "[T]he 'unreasonable application' prong of 28 U.S.C. § 2254(d)(1) requires a habeas petitioner to show that the state court's application of Supreme Court precedent was 'objectively unreasonable.'" *Fountain v. Kyler*, 420 F.3d 267, 273 (3d Cir. 2005). "[A] federal court's mere disagreement with the state court's application of Supreme Court precedent is not sufficient; rather, a state court adjudication fails the 'unreasonable application' test only if the state court identified the correct governing legal rule but unreasonably applied it to the particular case or if the state court either unreasonably extended a legal principle from Supreme Court precedent to a new context in which it should not apply or where it unreasonably refused to extend such a principle to a new context in which it should apply." *Id.* We do not address the "contrary to" prong of § 2254(d)(1) as the Pennsylvania Superior Court correctly identified *Bruton* as the controlling legal authority. *See Williams*, 529 U.S. at 406.

that the codefendant's confession was competent evidence against only the codefendant. The Supreme Court reversed, holding that

> because of the substantial risk that the jury, despite instruction to the contrary, looked to the incriminating extrajudicial statements in determining the [defendant's] guilt, admission of [the codefendant's] confession in this joint trial violated [the defendant's] right of cross-examination secured by the Confrontation Clause of the Sixth Amendment.

Id. at 126. The Court acknowledged that the instructions to the jury were clear, *id.* at 137, but reasoned that

> there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. . . . . Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial.

Id. at 135-36 (citations omitted). Accordingly, the Court refused to accept the limiting instruction as an adequate substitute for the constitutional right of cross-examination. *Id.* at 137.

Two decades later, the Supreme Court revisited *Bruton* in *Marsh*. In that case, the nontestifying codefendant's "confession was redacted to omit all

reference to [Marsh] – indeed, to omit all indication that *anyone* other than [two other individuals] participated in the crime." 481 U.S. at 203. Nonetheless, Marsh filed a § 2254 petition, alleging, *inter alia*, that the introduction of her codefendant's confession violated her rights under the Confrontation Clause. The Supreme Court began its analysis by pointing out that *Bruton* was a "narrow exception" to the accepted principle that jurors are presumed to follow their instructions. *Id.* at 207. It noted that there was "an important distinction between this case and *Bruton*, which cause[d] it to fall outside the narrow exception," as Marsh's codefendant's confession did not expressly implicate her and became incriminating "only when linked with evidence introduced later at trial ([Marsh]'s own testimony)." *Id.* at 208.

The *Marsh* Court observed that

> evidence [in a statement] requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redactions – a possibility suggested in that opinion itself.

Id. at 208-09. After considering the difficulties that would arise if *Bruton* was "extended to confessions incriminating by connection," the Court rejected a rule that would outright prohibit the use of a codefendant's confession. *Id.* at 209. Consistent with its recognition that "confessions that do not name the defendant" are different than *Bruton*, which involved a facially incriminating confession, the Court held that

> The Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence.

Id. at 211. In a footnote, however, the *Marsh* Court made clear that it was not expressing an "opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* n.5.

Bruton and *Marsh* instruct that: (1) unredacted confessions by codefendants that implicate the defendant are generally inadmissible, *Bruton*, 391 U.S. at 126; (2) redacted confessions that completely sanitize a codefendant's statement by removing any reference to a defendant's name and existence are generally admissible, *Marsh*, 481 U.S. at 211; and (3) when a redaction is utilized to avoid a violation of the Confrontation Clause there must be a limiting instruction to the jury. Neither *Bruton* nor *Marsh* clarified the middle ground regarding the method for satisfactorily redacting a nontestifying codefendant's confession. Indeed, *Marsh* declared that it was not addressing the admissibility of redacted statements that utilize neutral pronouns, such as the redactions of Finney's and Womack's statements that were admitted in Greene's trial. *Id.* at 211 n.5.

In light of these principles, pre-*Gray* "courts generally followed the practice of redacting co-defendants' statements in order to eliminate all explicit reference to other defendants on trial." *Priester*, 382 F.3d at 398. Consistent with that

practice, the Pennsylvania Superior Court recognized that the redaction of a codefendant's statement was a permissible mechanism for avoiding a *Bruton* violation. It reviewed the redacted statements that were admitted and noted that, consistent with *Bruton* and *Marsh*, all references to the other defendants by proper name or nickname had been removed. The Pennsylvania Superior Court also noted that the jury had been properly instructed that it could only consider each redacted statement as evidence against the individual who made the statement and that these statements could not be considered in deciding any other defendant's culpability for the crimes charged. As such, the Pennsylvania Superior Court concluded that Greene's rights under the Confrontation Clause had not been violated.

In light of *Bruton* and *Marsh*, the Pennsylvania Superior Court's conclusion was not unreasonable. Unlike *Bruton*, which involved two individuals, and *Marsh*, which involved three, the robbery in this case involved five or six individuals. As a result, Finney's and Womack's redacted statements did not directly implicate Greene. Moreover, the substitutions that were used for the names of the codefendants yielded confusing statements that failed to establish either the number of persons involved or, except for the shooter, the role that each person played in committing the offense. In the absence of a redaction that expressly implicated Greene, it was not unreasonable for the Pennsylvania Superior Court to conclude that the jury would follow the limiting instructions it had received.

V.

This case presents a vexing conundrum that cannot, no matter how one views the facts or law, be avoided. While we cannot predict with absolute certainty what date the Supreme Court would use to determine "clearly established Federal law" for purposes of § 2254(d)(1), our decision today represents a careful consideration of the pertinent, conflicting authorities, and we believe that we have reached the best conclusion given the guidance we have to date. Ultimately, only the Supreme Court can resolve such uncertainty as exists. For now, we hold that "clearly established Federal law" for purposes of § 2254(d)(1) should be determined as of the date of the relevant state-court decision. In this case, because the Pennsylvania Superior Court's December 16, 1997 decision did not unreasonably apply the "clearly established Federal law" that existed at that time, *Bruton* and *Marsh*, we will affirm the judgment of the District Court.

Eric Greene v. John A. Palakovich, et al.

No. 07-2163

AMBRO, Circuit Judge, concurring in part and dissenting in part

Although I agree with my colleagues that Greene's claim is not procedurally defaulted and join Part II of the majority opinion in full, I respectfully disagree with their determination of the controlling date for "clearly established Federal law" under 28 U.S.C. § 2254(d)(1). As my colleagues recognize, the authority

on this question is conflicting and, save for a First Circuit Court opinion, unreasoned. But choosing the date of the relevant state-court decision, as our Court does today, leaves a twilight zone between the cutoff set by the majority here and the retroactivity analysis of the Supreme Court's decisions in *Griffith v. Kentucky*, 479 U.S. 314 (1987), and *Teague v. Lane*, 489 U.S. 288 (1989) (plurality).[1] The consequence of the majority's opinion today is that a criminal defendant who is denied the right under *Griffith* to apply a new constitutional rule to his or her case on direct appeal is left without later recourse to federal *habeas* review to correct that error.

I. Background

To set the stage here, Greene argued prior to his state trial that proceeding jointly against him and his co-defendants would prejudice his defense and his constitutional right to confront witnesses "when the Commonwealth offer[ed] into evidence [out-of-court] statements made by the co-defendants." He cited for support the Supreme Court cases then known – *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987). The motions judge, recognizing the prejudice of those statements fingering Greene, thought she could cancel out that prejudice by simply redacting Greene's name when the statements were read to the jury and giving a limiting instruction to the jury.

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[1] "Although *Teague* was a plurality opinion that drew support from only four members of the Court, the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter." *Danforth v. Minnesota*, 552 U.S. 264, 266 n.1 (2008) (citation omitted).

Bruton (as clarified in *Richardson*) was not enough to win the point for Greene. He remained short of the winning line on his appeal when the Pennsylvania Superior Court ruled on December 16, 1997, that *Bruton* was not violated.

But there was hope, as Greene filed timely a petition for allowance of review to the Pennsylvania Supreme Court. That hope received a big boost when the Supreme Court of the United States decided *Gray v. Maryland*, 523 U.S. 185 (1998), while his petition was pending. *Gray* held that redacting names from confessions using obvious blanks falls within the class of claims protected by *Bruton*. This was good news indeed for Greene. The Pennsylvania Supreme Court would no doubt take note of *Gray* and grant review.

Indeed it did, and it did so on the very issue decided by *Gray*. Yet for reasons we do not know, it abruptly dismissed its grant of appeal as "having been improvidently granted," in effect leaving in place post-*Gray* the Superior Court's pre-*Gray* decision on Greene's Confrontation Clause rights.

Greene filed a petition seeking collateral relief under Pennsylvania's Post-Conviction Relief Act ("PCRA"), 42 Pa. Cons. Stat. Ann. §§ 9541-46. He did not allege that his Confrontation Clause rights were violated (and thus did not cite *Bruton* or *Gray*), ostensibly because the PCRA proscribes relitigating matters already dealt with on direct appeal. 42 Pa. Cons. Stat. Ann. § 9543(a)(3). Nonetheless, my colleagues state that, had he done so, Greene would have "obtained a later, post-*Gray* state-court decision on the merits." Maj. Op. at 37a. They claim – incorrectly, I believe, for the reasons stated more fully

in note 13 below – that failure to raise *Gray* in his PCRA petition "shrank the universe of 'clearly established Federal law' available to him for his § 2254 petition." *Id.* at 39-43. They say this while conceding that "Greene fairly presented the factual and legal substance of his Confrontation Clause claim to the Pennsylvania state courts." *Id.* at 17. We do not consider federal claims procedurally defaulted, "even if the procedural rule is theoretically applicable to [the] facts," unless the last state court rendering a judgment in the case "clearly and expressly states that its judgment rests on a state procedural bar." *Holloway v. Horn*, 355 F.3d 707, 714 (3d Cir. 2004) (citations omitted). There is no clear or express statement here.

Greene's frustrating failure with the Pennsylvania court system was over, but all was not lost. He thought he could seek *habeas* review of his Confrontation Clause rights in a federal court. And he did.

This is where we come in after the District Court ruled against Greene: were his Confrontation Clause rights "clearly established [as] Federal law" when they were "adjudicated on the merits in State court proceedings"? 28 U.S.C. § 2254(d)(1). The answer is yes if we look to all United States Supreme Court decisions before his conviction became final,[2] but no if we stop with the decision of the Pennsylvania Superior Court less than two and a half months before the *Gray* decision. Greene is in the unwelcome twilight zone

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[2] Finality means that "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition of certiorari elapsed or a petition for certiorari finally denied." *Griffith*, 479 U.S. at 321 n.6.

where, in the United States Supreme Court's own words, "uncertainty" currently exists. *Smith v. Spisak*, 558 U.S. ___, 130 S. Ct. 676, 681 (2010).

II. Analysis

This is not a situation where Greene is seeking to take belated advantage of a rule to which he is not entitled. He is asking us to apply a case that should have been applied on direct review. Under the Supreme Court's *Griffith* jurisprudence, he was entitled to the benefit of *Gray*. It is only because the Pennsylvania state courts failed to apply it to his case that we are evaluating it in the first instance on *habeas* review.

My analysis differs from that of the majority. In a nutshell, subsection 2254(d)(1) does not choose any cutoff date. Thus, we are left with the retroactivity jurisprudence of *Griffith* and *Teague*. Because *Gray* was decided prior to the date Greene's conviction became final, I believe *Griffith* requires its application to this case. I would therefore reverse the judgment of the District Court and remand for consideration of *Gray*.[3]

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[3] Directing the District Court to consider *Gray* does not mean that Greene would get *habeas* relief. The Pennsylvania state courts may have applied Pennsylvania's own existing Confrontation Clause jurisprudence that was not contrary to, or an unreasonable application of, the constitutional rule announced in *Gray* even though *Gray* did not yet exist. AEDPA does not allow a writ of *habeas corpus* to be granted for simple errors of law; a writ is granted only when there is an unreasonable error of law. *See Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., for the Court) ("[A]n *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law.) (emphasis in original)).

A. As noted, the question of whether § 2254(d)(1) sets a cutoff date is unresolved.

I agree with the majority that "clearly established Federal law" did not have any special meaning prior to AEDPA and the text of 28 U.S.C. § 2254(d)(1). *See* Maj. Op. at 25a n.10. Nor does the text of 28 U.S.C. § 2254(d)(1) have an express time cutoff for "clearly established Federal law." My colleagues read the statute implicitly to require that any Supreme Court decision handed down after the relevant state-court decision on the merits is to be ignored for purposes of *habeas* relief. I disagree that "[r]eading the language plainly," or in a "straightforward" way, as my colleagues suggest, requires that the Supreme Court decision exist at the time of the state court's substantive resolution. If § 2254(d)(1) were so plain or straightforward, why does the Supreme Court say it is uncertain? And why are my colleagues of the view that "there is no clear answer to the issue we face"? Maj. Op. at 21a n.7. In the face of such uncertainty, I find it difficult to conclude that there is a "natural reading" of § 2254(d)(1) dictating a cutoff date.[4]

A primary reason for the Supreme Court's uncertainty as to whether the text of § 2254(d)(1) provides a clear cutoff date is its own decision in *Williams v. Taylor*, 529 U.S. 362 (2000). Inadvertently

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[4] One might think this is the paradigm for invoking the rule of lenity. If even the Supreme Court is uncertain which time trigger is in play as to when federal law is "clearly established," it seems fair that, while others may in the future lose in the twilight zone, Greene should not. As that is not how the majority rules, Greene's claim to *Gray's* benefits becomes simply sisyphean.

(no doubt), the Court had two different majorities identifying two different cutoffs.[5] Justice Stevens, writing for six members of the Court in Part III of his opinion, stated that the applicable date for purposes of determining whether federal law is established is "the time [the *habeas* petitioner's] state-court conviction became final." 529 U.S. at 390 (Stevens, J., for the Court). Justice O'Connor, writing for five members of the Court in Part II of her opinion, stated that "'clearly established Federal law' . . . refers to the holdings, as opposed to the *dicta*, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412 (O'Connor, J., for the Court). Neither Justice Stevens nor Justice O'Connor appears to have chosen a cutoff based on the text of the statute, and they did not acknowledge the discrepancy in their respective opinions. Indeed, in *Williams* the choice of cutoff would not have mattered because the case focused on *Strickland v. Washington*, 466 U.S. 668 (1984), a case decided prior to both the 1985 crime and the 1986 conviction in *Williams*, making the discussion of cutoff *dicta* because under both cutoffs *Strickland* was undoubtedly "clearly established Federal law."

Our task is to reconcile the conflicting majorities in *Williams* regarding the cutoff of "clearly established Federal law" under AEDPA while maintaining consistency with the Court's controlling decisions in

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[5] The fractured decision had Justice Stevens announcing the judgment of the Court and delivering the opinion of the Court (6 votes) with respect to Parts I, III, and IV of his opinion, and a minority opinion (4 votes) with respect to Parts II and V. Justice O'Connor delivered the opinion of the Court (5 votes) with respect to Part II of her opinion (save for a footnote).

Griffith and *Teague*. Recently, the Supreme Court recognized the "uncertainty" in temporal cutoff for "clearly established Federal law," and declined to resolve it at that time. *See Spisak*, 130 S. Ct. 15 681.[6]

Recognizing the Court's statement in *Spisak* as the "most telling observation regarding the use of the date the conviction became final," my colleagues dismiss it in a single sentence as "mere uncertainty [that] cannot counterbalance" the cases that select the date of the relevant state-court decision. Maj. Op. at 26a-27a. Moreover, they do so even though we agree that Supreme Court has never conducted a thorough analysis of the "clearly established" cutoff for AEDPA. *Id.* at 26-27. Though the Supreme Court has used the relevant state-court decision as the temporal cutoff in cases after *Williams*, I do not find this dispositive. Like our own checkered jurisprudence, it is not clear from the Supreme Court's cases whether it recognized these divergent approaches inasmuch as it was not required in those cases to resolve whether the cutoff date was the

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[6] Like this case, the timeline of *Spisak* has a "new rule" falling in the twilight zone between the last state-court decision on the merits and the date of finality. There, the last state-court decision on the merits was issued on April 13, 1988. *State v. Spisak*, 521 N.E.2d 800 (Ohio 1988); *see also Spisak v. Mitchell*, 465 F.3d 684, 688 (6th Cir. 2006). The conviction became final on March 6, 1989, when the Supreme Court of the United States denied *certiorari*. *Spisak v. Ohio*, 489 U.S. 1071 (1989). *Mills v. Maryland* was decided on June 6, 1988, in the period between the last state-court decision on the merits and the date of finality. 486 U.S. 367 (1988).

relevant state-court decision date or the date the conviction became final.[7]

If, as the majority suggests, the clear answer is the date of the relevant state-court decision, the *Spisak* Court would not have noted the uncertainty, nor would it have assumed the date of finality. The Court is not in the business of offering advisory opinions, and if it were clear that its prior cases had selected the date of the relevant state-court decision, it would not have issued the opinion in *Spisak*. It would have held instead that, because *Mills* was decided after the final state-court decision on the merits, AEDPA did not permit consideration of the case. It would have stopped its analysis there instead of going on at great length to evaluate the *Mills* claim on the merits. Thus, post-*Williams* Supreme Court precedent offers little to

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[7] The majority makes this observation with respect to our own precedent, yet does not reach the same conclusion with respect to the Supreme Court's rulings. In none of the cases cited by the majority as adopting the date of the relevant state-court decision was the Supreme Court required to determine the cutoff date, and in the only case where it had to confront the issue, *Spisak*, it sidestepped. We are not free to ignore that the Court itself has told us the law is "uncertain." I caution that I do not take "mere uncertainty" alone to "counterbalance the numerous Supreme Court decisions," but instead take the Supreme Court's express reservation of the question in *Spisak* as telling us that the issue remains unresolved and that there is little to be gleaned from other cases that, as the majority notes, take one approach "without analysis." Maj. Op. at 27a. In that respect, the Supreme Court's § 2254(d)(1) precedent is like our precedent: it goes both ways and is unhelpful in resolving an inquiry that the decisions did not squarely address. Moreover, the selection of a cutoff date in Supreme Court cases is no more than *dicta*.

clarify the temporal cutoff for "clearly established Federal law" under AEDPA.

B. The Supreme Court has not abandoned its Retroactivity jurisprudence post-AEDPA.

AEDPA's concern over whether a state court ruling in a criminal case was contrary to, or an unreasonable application of, "clearly established Federal law" stems from the desire to avoid disturbing final criminal judgments through collateral review. In particular, the use of the past tense ("established") means that AEDPA is concerned with the law that should have been applied at the time of the state court proceedings. Where I diverge from my colleagues is how we determine what that body of law is.

Even though at first it seems conceptually difficult to say that a court unreasonably applied Supreme Court precedent that did not yet exist, retroactivity analysis becomes the tool for deciding. When a Supreme Court holding is retroactively applied to a prior proceeding, it is as if it existed at the time of that prior proceeding. The majority's view ignores controlling Supreme Court precedent that allows, in certain circumstances, for the retroactive application of constitutional rules to criminal cases even though they are announced after a state court ruling on the merits.

Paramount to understanding the Supreme Court's retroactivity jurisprudence is discerning its decisions in *Griffith* and *Teague*. They provide a distinction between "old rules" and "new rules," terms that have a clear meaning only when used in relation to a given criminal conviction. Unhelpfully, the Supreme Court

has used "new rule" to mean different things in the *Griffith* and *Teague* context.

A "new rule" for *Griffith* is one that is announced after a state court ruling on the merits. A "new rule" for *Teague* is one that is announced after a conviction becomes final. This means that in the application of *Gray* to Greene's conviction, *Gray* is a "new rule" for *Griffith* purposes but is an "old rule" for *Teague* purposes. We are principally concerned with the *Teague* distinction between "old rules" and "new rules." The following table may aid in understanding the discussion that follows.

Date of Supreme Court Decision (relative to the criminal conviction)	**Old or New for *Teague?***	**Applicable to criminal case?**	**Majority reading of § 2254(d)(1) "clearly established Federal law"**
Before the last state-court decision on the merits on direct review	Old rule under *Teague* because it is pre-finality	Yes, because it is/was existing precedent (direct appeal and collateral review)	Yes, because it was existing precedent on direct review
After the last state-court decision on the merits on direct review, but before finality	Old rule under *Teague* because it is pre-finality	Yes, because *Griffith* makes it applicable (direct appeal and collateral review)	No, because it post-dates the state-court decision

After finality	If dictated by pre-finality precedent, old rule under *Teague*. Otherwise, new rule under *Teague*.	Maybe under *Teague*, only applicable if a narrow exception is met, or was dictated by pre-finality precedent (collateral review)	No, because it post-dates the state-court decision

C. The Supreme Court has a developed jurisprudence governing the application to cases on collateral review of its cases decided pre-finality and those decided post-finality.

The retroactive application of newly announced constitutional rules in criminal cases has long troubled the Supreme Court. As noted, retroactivity takes that rule and transports it back in time to a proceeding that pre-dated the announcement of the rule, treating the rule as if it existed at the time of the prior proceeding. Because this fiction has the potential to upset settled proceedings, especially in the criminal context, over the years the Court came to adopt a bright line that splits the application of these rules into two domains of review.

Whether a new rule applies retroactively depends on whether a criminal conviction is on direct review or collateral review at the time of the Supreme Court decision announcing the new rule. If the conviction is on direct review when the new rule is announced, *Griffith* allows the retroactive application of the new rule to all criminal cases pending on direct review as a

"basic norm[] of constitutional adjudication." 479 U.S. at 322. If the conviction is on collateral review when the new rule is announced (*i.e.*, convictions that became final before the new rule is announced), *Teague* restricts the application of that new rule to narrow exceptions discussed below. This bright-line distinction was made due to the differing considerations between the two domains of review.

1. *Griffith*

The *Griffith* Court held that the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. It was the very "integrity of judicial review" that required application of a new constitutional rule "to all similar Cases pending on direct review." *Id.* at 323. Two principles guided this decision. First, the Court recognized that

> [a]s a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final. Thus, it is the nature of judicial review that precludes us from "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule."

Id. (citation omitted). Second, the Court recognized that

> selective application of new rules violates the principle of treating similarly situated defendants the same. As we pointed out in *United States v. Johnson*, the problem with not applying new rules to cases pending on direct review is "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of a new rule. Although the Court had tolerated this inequity for a time by not applying new rules retroactively to cases on direct review, we noted: "The time for toleration has come to an end."

Id. (citations omitted) (emphasis in original). The Court therefore held "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Id.* at 328. I note that "pending on direct review" is slightly different from "not yet final." A case that has already exhausted the direct appeal as of right resulting in a state-court decision on the merits, but is not yet final, is still within the purview of *Griffith*. Finality is the key date.

The *Griffith* Court "instruct[ed] the lower courts," state and federal, "to apply the new rule retroactively to cases not yet final." *Id.* at 323. It did not merely advise those courts to consider applying the rule subject to their discretion, but mandated application of the new rule. It was only through this mandate that

"*actual inequity*" between "many similarly situated defendants" would be avoided.[8]

2. *Teague*

In *Teague*, the Supreme Court dealt with the other side of the retroactivity question. Collateral attacks such as *habeas corpus* are not meant to be a substitute for direct review, and the Court has recognized an interest in leaving concluded litigation in a state of repose. 489 U.S. at 306 (*quoting Mackey v. United States*, 401 U.S. 667, 682-83 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)). Quoting the second Justice Harlan, the Court noted that it was "'sounder, in adjudicating habeas petitions, generally to apply the law prevailing at the time a conviction became final than it is to seek to dispose of [*habeas*] cases on the basis of intervening changes in constitutional interpretation.'" *Id.* (*quoting Mackey*, 401 U.S. at 689 (Harlan, J.) (alteration in original)). The Court identified only two exceptions to the general prohibition against the retroactive application of new post-finality rules to cases on collateral review: (1) new rules that place certain kinds of primary, private individual conduct beyond

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[8] For instance, it would undermine the integrity of judicial review if among ten similarly situated criminal defendants – all duly convicted in state court, all having only the petition for *certiorari* to the Supreme Court of the United States as their remaining recourse on direct appeal and all raising the same question of constitutional law – only one were permitted to benefit from a new rule, leaving the other nine to "flow by unaffected by that new rule." *Griffith*, 479 U.S. at 323 (citation omitted). It is to avoid this inequality between a lucky defendant and an unlucky (but similarly situated) defendant that *Griffith* draws its bright line and requires application of the new rule.

the power of the criminal law-making authority to proscribe, *id.* at 307; and (2) new "watershed rules of criminal procedure . . . [that] 'alter our understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction,'" *id.* at 311 (emphasis in original) (citation omitted).

In deciding *Griffith* and *Teague*, the Supreme Court has carefully set out the different concerns in the pre-finality (direct appeal) and post-finality (collateral attack) application of new rules. In the context of retroactivity for federal *habeas* review, the *Teague* Court focused on the distinction between intermediate judgments subject to appeal and final judgments subject only to collateral attack:

> Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect. The fact that life and liberty are at stake in criminal prosecutions "shows only that 'conventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*."

Id. at 309 (emphases in the original) (citation omitted). With this view of finality, the Court held that "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced," using finality, not the date of the relevant state-court decision, as the inflection point between *Griffith* and *Teague*. *Id.* at 310.

D. Section 2254(d)(1) does not discard *Griffith* and *Teague*.

In a unanimous post-AEDPA and post-*Williams* decision, *Whorton v. Bockting*, 549 U.S. 406 (2007), the Supreme Court held that *Griffith* and *Teague*

> laid out the framework to be used in determining whether a rule announced in one of [the Court's] opinions should be applied retroactively to judgments in criminal cases that are already final on direct review. Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review. *See Griffith*, 479 U.S. 314.[9] A

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[9] The Supreme Court here meant "old rule" (pre-finality) and "new rule" (post-finality) for *Teague* purposes. I disagree with my colleagues when they state that "[t]he sentence following the *Griffith* citation in the *Whorton* decision further confirms [their] understanding by explaining how new rules apply in collateral proceedings through citation to *Teague*, not *Griffith*." Maj. Op. at 32a. This case is not about "extending" *Griffith* to collateral review or "import[ing]" *Griffith* into *Teague*. This case is not even about "new rules" – it is about "old rules," meaning all pre-finality Supreme Court precedent. The majority takes issue with applying "old rules" to collateral review, but if "old rules" do not apply on collateral review, which rules do? *Griffith* defines the body of law that should be applied on direct review, that is, all precedent that is decided prior to a conviction's finality. This relates to collateral review because *habeas* is concerned with what body of law should have been applied on direct review. The relation of *Griffith* to collateral review is nothing novel or profound.

As my colleagues concede, Maj. Op. at 29a, a rule that is handed down pre-finality is an *old rule* and need not pass the *Teague* test. Instead, it is governed by *Griffith* and is applicable

> new rule applies retroactively in a collateral proceeding only if [the *Teague* requirements are met].

549 U.S. at 416.[10] Though *Whorton* dealt with an application of *Teague*, it explicitly recognized that

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"both on direct and collateral review." *Whorton*, 549 U.S. at 416. Furthermore, the Supreme Court has applied *Griffith*'s retroactivity principle in the *habeas* context, giving *habeas* petitioners the rights established by all Supreme Court decisions that pre-date a conviction's finality:

> Penry's conviction became final on January 13, 1986, when this Court denied his petition for certiorari on direct review of his conviction and sentence. This Court's decisions in *Lockett v. Ohio* and *Eddings v. Oklahoma* were rendered before his conviction became final. Under the retroactivity principles adopted in *Griffith v. Kentucky*, Penry is entitled to the benefit of those decisions.

Penry v. Lynaugh, 492 U.S. 302, 314-15 (1989) (citations omitted), *abrogated on other grounds by Atkins v. Virginia*, 536 U.S. 304 (2002).

We have likewise done so in our own *habeas* cases, applying pre-finality decisions on *habeas* review under the authority of *Griffith*. *See, e.g. Lewis v. Horn*, 581 F.3d 92, 102 n.5 (3d Cir. 2009) ("Although Abu-Jamal, like Lewis, was convicted prior to the Supreme Court's decision in *Batson*, his direct appeal was still pending when the Supreme Court decided *Batson*, and therefore *Batson* applied retroactively to his case." (*citing Griffith*, 479 U.S. at 328)); *Simmons v. Beyer*, 44 F.3d 1160, 1164-65 (3d Cir. 1995) ("Had Simmons received a timely review, his conviction would have been final before 1986. In a sense, he is a 'chance beneficiary' of the *Batson* rule . . . [, but] we see no reason to bend the rule in *Griffith* to deny Simmons the constitutional protection afforded in *Batson*." (*citing Griffith*, 479 U.S. at 323)).

[10] In *Whorton*, the Court analyzed whether *Crawford v. Washington*, 541 U.S. 36 (2004), a case that was decided after the *habeas* petitioner's conviction was final, was applicable to his case

Griffith requires that "old rules" be applied both on direct *and collateral* review.[11] To me this means that the *Whorton* Court unanimously endorsed *Griffith* and the idea that a Supreme Court decision handed down after the last state court ruling on the merits, but before finality, is an old rule that is applicable even under AEDPA and even if it is not a "watershed" ruling or does not place conduct beyond the power of the state to proscribe.

Given the Court's retroactivity concerns, I believe the better reading of § 2254(d)(1) is that it does not set a definitive cutoff date for "clearly established Federal law." It is the Supreme Court's retroactivity jurisprudence of *Griffith* or *Teague* that determines applicability on collateral review, not AEDPA.

My colleagues' reading of § 2254(d)(1) conflicts with *Whorton*. They refuse to include all "old rules" as "clearly established Federal law." This reading contradicts the unanimous holding in *Williams* that all "old rules" for *Teague* purposes are "clearly established Federal law."[12] My colleagues recognize this

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as a "new rule." Implicit in the analysis is the recognition that cases decided after the last state-court decision on the merits may nonetheless be applicable to cases under AEDPA so long as they meet the appropriate retroactivity test. Otherwise, there would be no need to consider whether *Crawford* applied because it did not exist at the time of the last state-court decision on the merits.

[11] As noted above, an "old" rule is any rule that existed prior to finality or was dictated by the governing precedent at the time of finality.

[12] Notwithstanding the apparent conflict in time cutoff in *Williams*, Justice O'Connor and Justice Stevens did agree that "whatever would qualify as an old rule under [the Court's] *Teague* jurisprudence will constitute 'clearly established Federal law, as

contradiction, but they choose to ignore *Griffith* and *Teague* and adopt Justice O'Connor's initial unreasoned declaration (that chose the date of the relevant state-court decision and cited no case) and not her later reasoned one (that referred to "old rules" under *Teague* and cited Supreme Court precedent). *See* 529 U.S. at 412 (*citing Stringer v. Black*, 503 U.S. 222, 228 (1992)). It is unclear to me why we would choose her statement of the law (a *dictum*, no less) in conflict with the Supreme Court's decisions in *Griffith* and *Teague* instead of her statement of the law in harmony with those Supreme Court holdings and *Whorton* (and that actually invokes the controlling Supreme Court precedent of *Teague*).

E. The majority's cutoff creates a twilight zone

If the relevant cutoff date is the date of the last state-court decision on the merits, we would create a twilight zone for criminal defendants. Consider the possible times relative to a state court conviction when a decision by the Supreme Court is announced: (1) prior to the last state-court decision on the merits; (2) between the last state-court decision on the merits and finality; and (3) after the conviction is final. If it were decided in the first period (prior to the last state-court decision on the merits), a state court would have to

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determined by the Supreme Court of the United States' under § 2254(d)(1)." 529 U.S. at 412 (O'Connor, J., for the Court (joined by Rehnquist, Kennedy, Thomas, & Scalia, JJ.)); *see also id.* at 379-81 (Stevens, J., 4-vote portion (joined by Souter, Ginsburg, & Breyer, JJ.)) (distinguishing "new rules" from "clearly established" rules). In other words, the court was unanimous in holding that all "old rules" under *Teague* constitute "clearly established Federal law" under AEDPA.

apply it to be consistent with *Griffith*. If it were decided in the third period (after finality), *habeas* relief would be available as a "new rule" under *Teague* if the decision announced a "watershed" rule or placed certain conduct beyond the power of the state to proscribe. However, if it were decided in the second period (the twilight zone between the last state-court decision on the merits and before finality), the majority's time cutoff would nonetheless consider it not to be "clearly established Federal law" and would bar *habeas* relief because the rule did not exist at the time of the last state-court decision on the merits. The Majority reaches this conclusion even though, as discussed above, a rule announced pre-finality is an "old rule" for *Teague* purposes and *Griffith* requires its application on direct and collateral review.[13]

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[13] As noted above, the majority states that Greene could have raised a *Bruton* Confrontation Clause claim on PCRA review, thereby receiving a post-*Gray* state-court decision on the merits. Maj. Op. at 35a & n.12. I believe this is not correct. The PRCA entitles state prisoners to relief only if they plead and prove an allegation of error that "has not been previously litigated or waived." 42 Pa. Cons. Stat. Ann. § 9543(a)(3). Greene had previously litigated his Confrontation Clause claim on direct appeal and thus could not bring a PCRA action.

"[A]n issue has been previously litigated if . . . the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue." *Id.* § 9544(a)(2). "Whether an issue was previously litigated turns on whether '[the issue] constitutes a discrete legal ground or merely an alternative theory in support of the same underlying issue that was raised on direct appeal.'" *Commonwealth v. Small*, 980 A.2d 549, 569 (Pa. 2009) (alteration in original); *see also Commonwealth v. Collins*, 888 A.2d 564, 570 (Pa. 2005). Furthermore, citing to different authority for the same issue "does not change the fact [that] th[e] issue was previously litigated. To

hold otherwise would mean a PCRA petitioner could raise an issue on direct appeal, and raise it again in a PCRA petition merely by citing a different case to support the original theory." *Small*, 980 A.2d at 569.

My colleagues and I agree that Greene has not procedurally defaulted his *Bruton* claim, having raised it on direct appeal. We agree that he litigated his *Bruton* claim in the Pennsylvania Superior Court. We agree that the Superior Court ruled on the merits of this claim. We agree that he raised it in his petition for allowance of appeal with the Pennsylvania Supreme Court. In other words, there can be no dispute that the *Bruton* claim was "previously litigated" for purposes of the PCRA. While my colleagues suggest that *Gray* was a discrete legal ground because it answered the question left open in *Marsh* regarding pronoun or symbol substitutions, the fact remains that the Pennsylvania Superior Court directly addressed the issue of pronoun substitutions in Greene's direct appeal. App. 990 (Pa. Super. Ct. Op.) (*citing Commonwealth v. Miles*, 681 A.2d 1295, 1300 (Pa. 1996)). Though *Gray* was decided later, the "discrete legal ground" was before the Superior Court and it decided that issue. In any event, to the extent that my colleagues believe that the Pennsylvania courts might have relaxed their PCRA standards to allow Greene to make the claim, that is pure speculation.

A similar situation arose in another Pennsylvania case cited by the Commonwealth. *Commonwealth v. Washington*, 927 A.2d 586, 608-09 (Pa. 2007). There, Washington unsuccessfully raised a *Bruton* claim very similar to Greene's at trial and on direct appeal to the Pennsylvania Supreme Court. Subsequent to Washington's conviction becoming final, *Gray* was decided. On PCRA review, he invoked *Gray*, reasserted his *Bruton* claim, and argued that it was not previously litigated. The Pennsylvania Supreme Court rejected this argument and held the *Bruton* claim "previously litigated because [it] reviewed the claim and ruled on the merits of the issue" on direct appeal. *Id.* at 609. Likewise, Greene could not raise the claim in his PCRA petition as the majority suggests he should have done. He had pursued his colorable *Bruton* claim based on federal law "as far as possible in the state courts." *See* Maj. Op. at 37a.

So inflexible is the "plain reading" the majority adopts that even "new rules" that pass the *Teague* test for retroactive application would not entitle a petitioner to *habeas* relief. "New rules" for *Teague* purposes are always decided after the date of the relevant state-court decision, as they come into being after finality. Yet the majority would not consider the "new rule" to be "clearly established Federal law" because the "new rule" did not yet exist, and no relief could be granted.[14] Such a Catch-22 reading of §

Of course, the issue is not whether *Washington* is factually on point with Greene's case, or whether it is theoretically possible that Greene could have raised a claim based on *Gray* on PCRA review, but whether the meaning of "clearly established Federal law" under § 2254(d)(1) means different things in different cases depending on the availability of state collateral review. What my colleagues essentially hold is that when a defendant has "previously litigated" a novel constitutional claim on direct appeal, but the Supreme Court recognizes the constitutional rule in a different case before his conviction becomes final, he has no federal *habeas* recourse if the state courts do not apply the constitutional rule to his case on direct review and the state collateral process prohibits him from re-raising the claim.

[14] Although another portion of AEDPA, 28 U.S.C. § 2244(d)(1)(C), resets the one-year period of limitation when the Supreme Court newly recognizes a constitutional right and makes it retroactively applicable to cases on collateral review, it is § 2254(d)(1) that governs the substantive power of the federal courts to grant a federal remedy to defendants in state custody. Section 2254(d)(1) states that the writ of *habeas corpus* "shall not be granted" unless it was contrary to, or involved an unreasonable application of, "clearly established Federal law." The majority's reading of § 2254(d)(1) means a new rule that satisfies *Teague* and is made retroactively applicable to cases on collateral review would not be *time-barred* by § 2244, but a federal court would still be powerless to grant relief under § 2254. Thus, if a watershed decision such as *Gideon v. Wainwright*, 372

2254(d)(1) effectively disregards *Griffith* and *Teague* even as the Supreme Court has maintained that both decisions remain viable.[15]

As discussed above, even though at first it seems conceptually difficult to say that a state court unreasonably applied Supreme Court precedent that did not yet exist, the Supreme Court's retroactivity analysis treats the precedent as if it existed at the time of that prior state court proceeding. Under *Griffith*, Supreme Court decisions are retroactively applied to those convictions not yet final at the time of

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U.S. 335 (1963), were to come down tomorrow as a "new rule," under the majority's holding one would be entitled to *file* for *habeas corpus*, but would not be entitled to *habeas relief*. The majority's reading of § 2254(d)(1) obviates the need for § 2244(d)(1)(C).

[15] In fact, the Supreme Court reversed our Court when we called into question the continuing relevance of *Teague*. *Horn v. Banks*, 536 U.S. 266, 272 (2002), *rev'g Banks v. Horn*, 271 F.3d 527 (3d Cir. 2001). The Supreme Court instead held the AEDPA and *Teague* inquiries to be distinct and required federal courts to address *Teague* when properly raised. *Id.* There appears to be additional confusion in the majority opinion when it suggests that I "would *sub silentio* codify *Teague*." Maj. Op. at 33. But I agree that AEDPA and *Teague* are distinct inquiries – AEDPA is concerned with the unreasonableness of the state court decision, while *Teague* is concerned with the yardstick we use to measure unreasonableness. Satisfying *Teague* may make a Supreme Court decision retroactive and "clearly established Federal law," but it does not necessarily mean that a state court decision was unreasonable. Likewise, if the relevant state-court decision is rendered post-finality (in the case of a state-court decision rendered during collateral review), *Teague* may still operate as a bar to federal *habeas* relief if the relevant Supreme Court decision is also post-finality. Even under my reading, AEDPA and *Teague* are distinct inquiries.

the decision. Furthermore, if the state court neglects to apply the rule retroactively to convictions not yet final, this can be still corrected after finality on collateral review. *See Whorton*, 549 U.S. at 416 ("[O]ld rule[s] appl[y] both on direct *and collateral* review." (emphasis added)). Under *Teague*, Supreme Court decisions are retroactively applicable even to convictions that were already final at the time of the decision if it announces a "watershed" rule or places certain conduct beyond the power of the state to proscribe. We know from *Whorton* that § 2254(d)(1) does not overrule *Griffith* and *Teague*, but by deeming irrelevant any case that post-dates the relevant state-court decision, the majority implicitly disregards both *Griffith* and *Teague*.

While another Circuit Court has rejected the majority's cutoff on fears of the potential for "state court . . . subver[sion] . . . by the simple expedient of summarily affirming a lower court's decision," *Foxworth v. St. Amand*, 570 F.3d 414, 432 (1st Cir. 2009), its reasoning does not depend on a distrust of the judicial integrity of state courts. A well-meaning state court system could innocently neglect to apply *Griffith* after its final decision on the merits, but before the conviction becomes final. If a state court were to ignore the mandate to apply the new rule to all cases still pending on direct appeal or not yet final, it would similarly undermine the integrity of judicial review. That would leave collateral review by *habeas corpus* as the only remedy to correct the mistake. Surely a criminal defendant is entitled to recourse if the state courts simply forget to check for new,

relevant Supreme Court precedent prior to finality.[16] This helps to avoid the situation where similarly situated defendants receive disparate treatment based on the happenstance of state court attention (or inattention).[17]

Yet, under the majority's selection of temporal cutoff, even that remedy would be foreclosed whenever the state courts declined to apply the rule without explanation. This would leave affected *habeas* petitioners as unfairly treated relative to other similarly situated individuals who were lucky enough to have the state courts apply the new rule.

* * * * *

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[16] To the extent that a defendant is not constitutionally entitled to counsel on discretionary appeals, it seems unreasonable to expect that defendant, who is likely incarcerated, to be fully abreast of Supreme Court rulings and the first person to bring intervening Supreme Court decisions to the attention of the state courts within the window for discretionary review. The state courts have an independent obligation under *Griffith* to ensure the application of intervening Supreme Court decisions to all cases that are not yet final.

[17] It is important to note that retroactively applying (under *Griffith*/*Teague*) Supreme Court decisions announced after the last state-court decision as "clearly established" does not impugn the state court that fails to predict a later Supreme Court ruling. After all, a state court is not faulted when *Griffith* directs the application of a "new rule" to cases that are not yet final, but already adjudicated on the merits. In that instance, the state court need only apply the rule to pending cases. Nor does it demonstrate a mistrust of state courts when *Teague* directs the application of a "new rule" to cases that are already final. Again, to fulfill their judicial obligations, state courts need only apply the retroactive rule to the affected cases.

It is not our place to second-guess the Supreme Court when it has held that: (1) Supreme Court decisions handed down prior to finality must be applied on both direct and collateral review under *Griffith*; (2) *Teague* and *Griffith* have continuing vitality after AEDPA; (3) all nine Justices in *Williams* agreed that an "old rule" under *Teague* qualifies as "clearly established Federal law"; and (4) its decisions since *Williams* have not definitively set a temporal cutoff. In the absence of an express statement to the contrary by the Supreme Court (and there is none), we are bound to apply the clearly expressed (and still controlling) jurisprudence of *Griffith* and *Teague*. The Court may wish, in the AEDPA context, to cut back on *Griffith* and *Teague*, but it, not us, possesses the power to overrule its precedent.

I would hold that the cutoff date for "clearly established Federal law" is not prescribed by 28 U.S.C. § 2254(d)(1). The retroactive application of constitutional rules to criminal cases is governed by *Griffith* and *Teague*, and I would look first to whether *Gray* was decided before or after finality to determine which rule applies. As here *Gray* was decided prior to finality, the Pennsylvania Supreme Court should have considered it in the course of fulfilling its responsibilities under *Griffith*. When it did not do so, the District Court on *habeas* review needed to correct this failure to consider *Gray*. Accordingly, I would vacate its judgment and remand for application of *Gray* to Greene's Confrontation Clause claim. For these reasons, I respectfully dissent from all but Part II of the majority opinion.

APPENDIX B

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2163

ERIC GREENE
also known as
JARMAINE Q. TRICE

v.

JOHN A. PALAKOVICH; THE DISTRICT ATTORNEY OF THE PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Eric Greene,
Appellant

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(District Court No. 2-04-cv-05200)
District Judge: The Honorable Clifford Scott Green

Argued March 8, 2010

Before: AMBRO, SMITH, and MICHEL,* Circuit Judges

(Opinion Filed: May 28, 2010)

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* At the time this matter was submitted to the Court, Judge Michel, who sat by designation, was a member of the panel. As Judge Michel retired from the Federal bench on May 31, 2010, this order is filed by a quorum of the panel. 28 U.S.C. § 46(d).

ORDER AMENDING DISSENTING OPINION

AMBRO, Circuit Judge

IT IS NOW ORDERED that the published Dissenting Opinion in the above case filed May 28, 2010, be amended as follows:

On page 14, carryover paragraph, line 6, change "bright-line" to "bright line".

On page 19, footnote 9, line 4, change "[its]" to "[their]".

On page 22, carryover paragraph, line 7, change "places" to "does not place".

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: July 22, 2010

APPENDIX C

UNITED STATES DISTRICT COURT,
E.D. PENNSYLVANIA

Eric GREENE, Petitioner,
v.

John PALAKOVICH, et al., Respondents.

No. 04-5200.April 2, 2007.

OPINION

MEMORANDUM

GREEN, Senior District Judge.

Presently pending is the Report and Recommendation (the "Report") of United States Magistrate Judge David R. Strawbridge and Respondents' Objections thereto. For the reasons set forth below, Respondents' Objections are overruled and the Report and Recommendation is approved and adopted.

BACKGROUND

In 1996, Petitioner Eric Greene ("Greene") was convicted and sentenced to life in prison for second-degree murder, three counts of robbery, and conspiracy. Greene's convictions arose out of the 1993 killing of a store clerk during a food market robbery. At trial, the prosecution produced evidence that Greene, who was tried under the name Jermaine

Trice, entered Lilly's Market with his co-defendants, Atil Finney and Julius Jenkins, while co-defendants Gregory Womac and Naree Abdullah waited in Womac's car. During the course of the robbery, Jenkins shot and killed store clerk Francisco Azcona with a .45 caliber revolver, and Petitioner stole the store's cash register. Three days after the homicide, four members of the same group robbed a check-cashing agency two blocks away from Lilly's Market. Shortly thereafter, police arrested the four men and recovered a .45 caliber revolver near the arrest location. Ballistics test revealed that the gun police recovered was the weapon used to kill Francisco Azcona.

Petitioner was charged with second-degree murder, robbery, and conspiracy, and tried before a jury together with four co-defendants. Defendants Finney and Womack confessed to the crimes, and excerpts of these confessions were admitted at trial. The confessions were redacted to exclude the names and personal details of the non-confessing co-defendants. Words and phrases such as "someone," "blank," "someone else," "two guys," "we," and "they" replaced the names of the non-confessing defendants. The trial court instructed the jury that each confession was only to be used against the particular defendant who made it.

Following his conviction on March 16, 1996, Petitioner filed several post-trial motions. The trial court denied these motions on March 10, 1997, and the trial judge subsequently sentenced Petitioner to life in prison. Petitioner then filed an appeal with the Pennsylvania Superior Court, which upheld his

conviction in an opinion dated December 16, 1997. The Pennsylvania Supreme Court granted a petition for allocator on August 14, 1998; however, this decision was reversed on April 29, 1999 when the same court determined that allocator had been improvidently granted. Greene did not file a petition for certiorari to the United States Supreme Court. On August 3, 1999, Greene filed a petition for state collateral review under Pennsylvania's Post Conviction Relief Act ("PCRA"). The trial court, acting as the PCRA court dismissed the petition in 2000, and this dismissal was affirmed by the Superior Court in 2003. The Pennsylvania Supreme Court denied allocator in 2004.

REPORT AND RECOMMENDATION AND RESPONDENTS' OBJECTIONS

Greene filed the instant *pro se* petition for habeas corpus relief in which he enumerates five claims; however, the Report and Recommendation issued by Magistrate Judge David R. Strawbridge ("the Report") identifies and denies twelve distinct claims advanced by Greene.[1] The Report recommends denying the

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[1] The Report identifies and denies the following twelve claims advanced by the Petitioner: 1) Petitioner claims he was denied the right to an effective appeal because he was not provided with a trial transcript; 2) Petitioner claims he was denied the right to effective assistance of counsel because of his counsel's failure to obtain the transcript; 3) Petitioner claims that the trial court's failure to sever his trial from that of his co-defendants improperly subjected him to a death qualified jury; 4) Petitioner claims that the trial court's failure to sever subjected him to prejudicial testimony concerning a separate robbery given in response to questioning from the prosecutor; 5) Petitioner claims

petition for habeas corpus, but granting a certificate of appealability on one claim only – Petitioner's assertion that the trial court's failure to sever his trial from that of his co-defendants unfairly infringed upon his Sixth Amendment right to confrontation by subjecting him to evidence coming from certain non-testifying co-defendants' improperly redacted confessions.

While no objections to the Report were filed by Petitioner, Respondents object on three grounds: 1) they argue that reasonable jurists cannot disagree as to the law applicable to the Petitioner's confrontation clause claim; 2) they argue that any improper redaction of the admitted confessions was harmless error; and 3) they argue that Petitioner has not

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that trial court's failure to sever subjected him to prejudicial testimony concerning a separate robbery given in response to questions from a co-defendant's counsel; 6) Petitioner claims that the trial court's failure to sever prejudiced him by having a police witness vouch for the testimony of a Commonwealth witness when cross-examined by a co-defendant's counsel; 7) Petitioner claims that the trial court's failure to sever prejudiced him by giving the prosecutor the opportunity to refer to the confessions of his co-defendants and to gesture to all defendants indicating that they were all implicated by the confessions; 8) Petitioner claims that the trial court erred in admitting evidence concerning a separate, unrelated robbery; 9) Petitioner claims that counsel who assisted him both at trial and on appeal was ineffective by failing to properly investigate and try the case; 10) Petitioner claims that separate PCRA counsel was ineffective in its representation of him in the PCRA process; 11) Petitioner claims that he was denied the right to appeal the PCRA court's denial of relief due to governmental interference. 12) Petitioner claims that the trial court's failure to sever the trial unfairly infringed upon his Sixth Amendment right to confrontation by subjecting him to evidence coming from certain non-testifying co-defendants' improperly redacted confessions.

procedurally exhausted his confrontation clause claim. For the reasons stated below, each of Respondents' objections will be overruled.

1. **Disagreement Over Applicable Law**

A certificate of appealability may be issued upon the denial of a habeas corpus petition in situations where reasonable jurists could disagree as to the merits of the Petitioner's claim. *See Miller-El v. Cockrell,* 537 U.S. 322, 336 (2003). Because reasonable jurists could disagree as to whether the U.S. Supreme Court's decision in *Gray v. Maryland,* 523 U.S. 185, 197 (1998), applies to the analysis of Petitioner's confrontation clause claim, a certificate of appealability will be issued for this specific claim only.

Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), a federal habeas court reviews a state court decision only to determine whether it was "contrary to" or an "unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A divided Supreme Court addressed the meaning of "clearly established Federal law" in *Williams v. Taylor,* where it concluded that clearly established law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *See* 529 U.S. 362, 412 (2000) (O'Connor, J.) (joined by four Justices); *but see Williams,* 529 U.S. at 380 (Stevens, J., concurring) (joined by three Justices) (stating that the appropriate standard to apply to a habeas petition is the law applicable "at the time the state decision became final"). Subsequent Supreme

Court decisions have followed Justice O'Connor's standard for identifying the point in time for determining the applicable law. *See Yarborough v. Alvarado,* 541 U.S. 652, 660 (2004); *Lockyer v. Andrade,* 538 U.S. 63, 71 (2003). Conversely, some Third Circuit Court of Appeals cases have applied different formulations of this timing rule. *See Fischetti v. Johnson,* 384 F.3d 140, 148 (3d Cir. 2004) (stating that the AEDPA requires the court to determine "what the clearly established Supreme Court decisional law was at the time petitioner's *conviction became final* ") (italics added); *Lewis v. Johnson,* 359 F.3d 646, 652-53 (3rd Cir. 2004) (citing *Williams,* 529 U.S. at 390 (Stevens, J., concurring)); *but see Priester v. Vaughn,* 382 F.3d 394, 400 (3d Cir. 2004) (refusing to consider a Supreme Court decision announced after the state court ruled on Petitioner's direct appeal); *Johnson v. Carroll,* 369 F.3d 253, 257 (3d Cir. 2004) (identifying "the time the state court renders its decision" as the applicable point on the time line).

Determination of the appropriate applicable Supreme Court precedent is key to assessing the merits of Petitioner's claim. In between the time the Pennsylvania Superior Court ruled on Petitioner's case and the time his conviction became final,[2] the Supreme

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[2] The Report concludes that Greene's conviction became final on July 29, 1999, when the time period in which he could make a direct appeal to the United States Supreme Court lapsed. *See* Sup. Ct. R. 13(1). The Pennsylvania Superior Court denied Greene's direct appeal on December 16, 1997. The Supreme Court issued the *Gray* decision in between these two dates, on March 9, 1998. The report concludes that December 16, 1997 is the relevant date in this case; therefore, it does not factor the

Court decided *Gray,* which held that a redacted confession of a non-testifying co-defendant which "replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol" violates the "defendant's rights under the Sixth Amendment confrontation clause"[3] 523 U.S. at 192. If *Gray* applies to Petitioner's claim, then it may bolster the merit of his claim because blank spaces and similar symbols of deletion were used in the redactions of his co-defendants' confessions. The Report concludes that the time of the relevant state court decision is the appropriate standard; therefore, it did not factor *Gray* into its analysis and denied the Petitioner's claim. Respondents object to the Report's recommendation that a certificate of appealability be issued. Because reasonable jurists could disagree as to the appropriate

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Gray decision into its analysis.

[3] *Gray* is one of a series of Supreme Court cases on the Sixth Amendment confrontation clause implications of admitting confessions of non-testifying co-defendants. The Court has established that the admission of a non-testifying co-defendant's confession that directly implicates the defendant violates the defendant's Sixth Amendment rights. *Bruton v. United States,* 391 U.S. 123, 126 (1968). The Court refined the protection of *Bruton* in *Richardson v. Marsh,* where it concluded that when a co-defendant's confession is redacted to omit any reference to the defendant, the defendant's Sixth Amendment rights are not violated regardless of whether other evidence properly admitted links the defendant to the confession. 481 U.S. 200, 211 (1987). *Gray* distinguished *Richardson* because the redacted confession in *Gray* refers directly to the existence of the non-confessing defendant while the *Richardson* confession did not. *Gray,* 523 U.S. at 195-96.

point in time upon which to identify the "clearly established law," Respondents' objection is overruled. Petitioner's confrontation clause claim is denied but a certificate of appealability will be issued.

2. Harmless Error

Respondents further argue that even if *Gray* is the appropriate standard to apply in this case, the error committed is harmless because it would not result in a different outcome. An error is not harmless when it "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 636 (1993) (citing *Kotteakos v. U.S.,* 328 U.S. 750, 776 (1946)).

Respondents assert that even if the confessions admitted at Greene's trial were improperly redacted, such error was harmless due to the overwhelming evidence presented against him. To support this conclusion, they cite several cases in which the Supreme Court and the Third Circuit have found that admission of an improperly redacted confession constituted harmless error. *See Brown v. United States,* 411 U.S. 223 (1973); *Schneble v. Florida,* 405 U.S. 427 (1972); *Harrington v. California,* 395 U.S. 250 (1969); *United States v. Ruff,* 717 F.2d 855 (3d Cir. 1983), *cert. denied,* 464 U.S. 1051 (1984). However, it should be noted that in these cases, the defendant asserting the confrontation clause violation had himself also confessed to the crime, thus adding significant weight to the prosecution's evidence. This is not the situation in the present case, for Petitioner never confessed to the crimes for which he was convicted. As the Report articulates, a reasonable

jurist could find that the jury concluded that Petitioner's name corresponded to one of the blanks in the redacted confession, exactly the type of inference that *Gray* seeks to prevent. *See Gray,* 523 U.S. at 193 (explaining that a when a co-defendant's confession is redacted using a blank space in place of a defendant's name, "the jury will often realize that the confession refers specifically to the defendant"). Respondents' objection based upon harmless error is accordingly overruled.

3. **Exhaustion of State Law Appeals**

Respondents argue that Petitioner's confrontation clause claim is procedurally defaulted because he did not properly exhaust the claim in state court. They assert that the only time Petitioner raised this particular claim was in his request for allocator from the Pennsylvania Supreme Court. They argue that in order to exhaust all state law remedies, the Petitioner must present his claim regarding improper redaction to the Pennsylvania Superior Court, which they claim he failed to do. *See Doctor v. Walters,* 96 F.3d 675, 678 (3d Cir. 1996) (petitioner must give each level of state courts a fair level of review); *Gibson v. Scheidemantel,* 805 F.2d 135, 138 (3rd Cir. 1986) (stating that both the facts and the legal theory of petitioner's arguments must be presented to the state courts).

The Report contains no analysis of any alleged procedural default for this particular claim. Respondents provide a copy of Greene's Brief to the Superior Court to support their argument; however, this document demonstrates that the general issue of

the redaction of the confessions was addressed.[4] The Brief presents a general confrontation clause claim regarding the redacted confessions of Greene's co-defendants and relies upon major Supreme Court cases to advance the argument. *See* Brief for Petitioner to Superior Court, at 22-24 (citing *Bruton* and *Richardson*). Greene's confrontation clause claim was properly exhausted in state court proceedings; therefore, Respondents' third objection is overruled.

For the reasons discussed above, Respondents' objections to the Report are overruled. An appropriate order follows.

ORDER

AND NOW, this 28th day of March 2007, upon consideration of the Petition for Writ of Habeas Corpus, and after review of the Report and Recommendation of United States Magistrate Judge David R. Strawbridge, and Respondents' Objections thereto, **IT IS HEREBY ORDERED** that:

1. Respondents' Objections are **OVERRULED.**

2. The Report and Recommendation is **APPROVED** and **ADOPTED.**

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[4] The second point in Greene's brief asserts that effective redaction of the co-defendants' confessions was attempted but "polluted" by "gross prosecutorial and police misconduct." *See* Brief for Petitioner to Superior Court, at 22-24. The District Attorney herself admits that the Superior Court adjudicated the merits of the confrontation clause claim regarding the redacted confessions. *See* Response to Petition for Habeas Corpus, at 17.

3. The Petition for Writ of Habeas Corpus is **DENIED.**

4. **A certificate of appealability is issued on Petitioner's Confrontation Clause claim only.**

[Magistrate's Report and Recommendation omitted]

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 07-2163

ERIC GREENE
also known as
JARMAINE Q. TRICE

v.

JOHN A. PALAKOVICH; THE DISTRICT ATTORNEY OF THE PHILADELPHIA COUNTY; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

Eric Greene,
Appellant

SUR PETITION FOR REHEARING

Present: MCKEE, Chief Judge, SLOVITER, SCIRICA, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., and VANASKIE, Circuit Judges*

The petition for rehearing filed by appellant in the above-titled case having been submitted to the judges who participated in the decision of this Court and to

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* The Honorable Paul R. Michel, Chief Judge of the United States Court of Appeals for the Federal Circuit, who sat by designation, retired from the Federal Bench on May 31, 2010.

all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judge Ambro would grant rehearing by the court en banc.

BY THE COURT,

/s/ D. Brooks Smith
Circuit Judge

Dated: July 20, 2010
Par/cc: I.K. Mc.G., Esq., S.E.A., Esq.

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 15 2011
OFFICE OF THE CLERK

No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii
REPLY BRIEF FOR PETITIONER 1
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Allen v. Ornoski, 435 F.3d 946 (9th Cir. 2006) 3

Belton v. Blaisdell, 559 F. Supp. 2d 128 (D.N.H. 2008) 5

Besser v. Walsh, 601 F.3d 163 (2d Cir. 2010) 5

Bruton v. United States, 391 U.S. 123 (1968) 7

Coleman v. Thompson, 501 U.S. 722 (1991) 10

Commonwealth v. Trice, 727 A.2d 1113 (Pa. 1999) 11

Cvijetinovic v. Eberlin, 617 F. Supp. 2d 620 (N.D. Ohio 2008), *rev'd on other grounds*, 617 F.3d 833 (6th Cir. 2010) 5

Daly v. Burt, 613 F. Supp. 2d 916 (E.D. Mich. 2009) 5

Dye v. Hofbauer, 546 U.S. 1 (2005) (per curiam) 6

Early v. Packer, 537 U.S. 3 (2002) (per curiam) 9

Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2009) 1, 2, 4

Gerrard v. Parrish, 2007 WL 151729 (D.N.J. Jan. 17, 2007) 5

Gray v. Maryland, 523 U.S. 185 (1998) 1, 2, 6, 7

Griffith v. Kentucky, 479 U.S. 314 (1987) 4

Harrington v. Richter, 131 S. Ct. 770 (2011) 9

Harris v. Reed, 489 U.S. 255 (1989) 10

Horn v. Banks, 536 U.S. 266 (2002) 8

Jackson v. Giurbino, 364 F.3d 1002 (9th Cir. 2004) 3

Jimenez v. Quarterman, 129 S. Ct. 681 (2009) 4

Khan v. Fischer, 583 F. Supp. 2d 390 (E.D.N.Y. 2008) 5

Lyons v. Weisner, 247 Fed. App'x 440 (4th Cir. 2007) 4

McBee v. Burge, 644 F. Supp. 2d 270 (E.D.N.Y. 2009), *aff'd*, 395 Fed. App'x. 762 (2d Cir. 2010) 5

Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010), *pet'n for cert. pending* (No. 10-851) 1, 4

People v. Raby, 775 N.W.2d 144 (Mich. 2009) 10

Portalatin v. Graham, 624 F.3d 69 (2d Cir. 2010), *pet'ns for cert. pending* (Nos. 10-8464, -8470 & -8502) 5

Rogers v. Hauck, 2009 WL 3584923 (D.N.J. Oct. 26, 2009) 5

Smith v. Spisak, 130 S. Ct. 676 (2010) 4, 5, 8, 9

Teague v. Lane, 489 U.S. 288 (1989) 3, 4, 8

Thompson v. Runnel, 621 F.3d 1007 (9th Cir. 2010) 2, 3, 4

United States v. O'Brien, 130 S. Ct. 2169 (2010) 8

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 6, 10

Statute

28 U.S.C. § 2254(d) 9

REPLY BRIEF FOR PETITIONER

The State agrees with petitioner on the three main postulates in his petition for certiorari: that the circuits are squarely split over when the temporal cutoff is for defining "clearly established law" under AEDPA; that this Court should eliminate the uncertainty over this fundamental issue of federal habeas law; and that this case is a good vehicle for doing so. At the same time, the State makes various subsidiary arguments that are incorrect or may be misleading. Petitioner offers the following reply to correct any misconceptions that might arise from the State's brief and to make clear why – as both parties ultimately agree – certiorari is necessary here.

1. *The Circuit Split.* The circuit split is deeper than the State acknowledges. In addition to conflicting with the Sixth Circuit's decision in *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010), *pet'n for cert. pending* (No. 10-851), the Third Circuit's decision here also conflicts – as the Third Circuit itself acknowledged (Pet. App. 19a n.7) – with the First Circuit's decision in *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009).

The State asserts that the First Circuit's discussion of the temporal cutoff for defining clearly established federal law was "only theoretical" because the Massachusetts Supreme Judicial Court decided on remand that the state prisoner's case had become final before this Court issued *Gray v. Maryland*, 523 U.S. 185 (1998), the decision that he (just like petitioner here) sought to have the federal courts apply. State's Br. 13 n.7; *see also* State's Br. 7 n.4. But at the time the case was before the First

Circuit, it was unclear (due to uncertainties involving state law and procedure) whether the prisoner's case had, in fact, become final before this Court decided *Gray*. And if *Gray* counted as clearly established law under AEDPA, the prisoner was entitled to habeas relief because the state court's decision was clearly contrary to that decision. *Foxworth*, 570 F.3d at 431-36. The "pivotal" and "dispositive" issue on which the First Circuit's decision "hinge[d]," therefore, was whether the temporal cutoff for clearly established law is finality (in which case *Gray* might apply) or the last state-court decision on the merits (in which case it would not). *Id.* at 429-30. The First Circuit held that finality is the cutoff date, and so it certified the case to the Massachusetts Supreme Judicial Court for a determination of when finality occurred. *Id.* at 430-32. Even though the Massachusetts Supreme Judicial Court held on certification that finality occurred before *Gray* was decided, there can be no question that the First Circuit's construction of federal habeas law is binding precedent in that court and that it squarely conflicts with the Third Circuit's holding here.

The Third Circuit's decision is also in serious tension – if not outright conflict – with Ninth Circuit law. As the State implicitly concedes (State's Br. 8), the temporal cutoff for defining clearly established law was "decisive" in *Thompson v. Runnel*, 621 F.3d 1007 (9th Cir. 2010). There, the Ninth Circuit granted a state prisoner habeas relief on the basis of a decision from this Court announced before the state prisoner's conviction had become final but after the last state-court decision on the merits. *See id.* at 1016 n.7. The State downplays this decision on the

ground that the Ninth Circuit rested its holding in part on the fact that California did not dispute that finality was the proper cutoff. State's Br. 13 n.7. But the Ninth Circuit also reasoned that the habeas petition was "governed by" the intervening decision from this Court, and the majority implicitly rejected the dissent's argument – identical to the Third Circuit's holding here – that AEDPA rendered that intervening decision inapplicable because it post-dated "the last reasoned state-court decision." *Id.* at 1023-24 (Ikuta, J., dissenting). The Ninth Circuit majority's reasoning also is consistent with two prior Ninth Circuit decisions, each stating that the temporal cutoff is "the time [the prisoner's] conviction became final." *Jackson v. Giurbino*, 364 F.3d 1002, 1005 (9th Cir. 2004) (citing *Williams v. Taylor*, 529 U.S. 362, 390 (2000) (Stevens, J.)); *see also Allen v. Ornoski*, 435 F.3d 946, 955 (9th Cir. 2006) ("The Supreme Court has adopted the definition of new law fashioned in *Teague v. Lane*, 489 U.S. 288 (1989), to determine what qualifies as clearly established law under AEDPA.").

2. *Importance.* The question presented here is very important not only – as the State acknowledges (State's Br. 5) – in terms of clarifying the "fundamental" legal contours of habeas law, but also in purely practical terms.

As the petition explained, the "twilight zone" between the last reasoned state-court decision and finality always lasts several months and usually lasts more than one year. Pet. 17-19. In suggesting that the twilight zone is actually shorter (State's Br. 7), the State omits (a) the period of time it takes a state to respond to a petition asking a state supreme court

to hear a case; (b) the period in which a state supreme court considers whether to grant review of a case; (c) the ninety-day period for filing a petition for certiorari in this Court; and (d) the several months it takes this Court to dispose of a petition when one is filed. *See Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987) (case is not final until "the time for a petition for certiorari [has] elapsed or a petition for certiorari finally [has been] denied"); *Jimenez v. Quarterman*, 129 S. Ct. 681, 685-86 (2009) (same).

Similarly, the State is mistaken in suggesting that courts have not grappled with this issue in very many published cases because the issue "arises infrequently." State's Br. 6. In reality, the issue arises quite often. But until very recently, states did not even argue that AEDPA altered the retroactivity cutoff established by *Teague*. For example, Ohio did not press the argument in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010); Michigan did not raise it in *Miller*, *see Miller* BIO at 4, 8; California did not press it in *Thompson*, 621 F.3d at 1016 n.7; and there was "room for doubt" whether Massachusetts actually pressed it in *Foxworth*, 570 F.3d at 429 n.4. A survey of district court and unpublished court of appeals cases from the past few years likewise reveals numerous instances in which the facts of the cases gave rise to the question presented but states either expressly conceded that *Teague*'s finality rule controlled or at least did not argue otherwise.[1] But

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[1] *See, e.g.*, *Lyons v. Weisner*, 247 Fed. App'x 440, 444 (4th Cir. 2007) (state conceded issue; habeas relief granted based on decision from this Court that predated finality but postdated

since this Court highlighted the issue in *Spisak* and expressed "some uncertainty" as to its proper resolution, 130 S. Ct. at 681, states like Pennsylvania here have been arguing that the cutoff for clearly established law is the last state-court decision on the merits, and courts are having to address the issue on a regular basis. (Witness the five federal circuit court decisions on the subject over the past twenty-one months, four of which postdate *Spisak*.[2]) This litigation and uncertainty will not abate until this Court resolves the issue.

3. *Suitability of the Vehicle.* The State correctly acknowledges – echoing the Third Circuit, *see* Pet.

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last reasoned state-court decision); *Rogers v. Hauck*, 2009 WL 3584923, at *13 n.4 (D.N.J. Oct. 26, 2009) (habeas petition implicated issue, but state apparently did not contest that finality was the cutoff); *Daly v. Burt*, 613 F. Supp. 2d 916, 924, 938-39 (E.D. Mich. 2009) (same); *McBee v. Burge*, 644 F. Supp. 2d 270, 280 n.5 (E.D.N.Y. 2009) (same), *aff'd*, 395 Fed. App'x. 762 (2d Cir. 2010); *Khan v. Fischer*, 583 F. Supp. 2d 390, 392 n.1 (E.D.N.Y. 2008) (same); *Belton v. Blaisdell*, 559 F. Supp. 2d 128, 148 n.22 (D.N.H. 2008) (same); *Cvijetinovic v. Eberlin*, 617 F. Supp. 2d 620, 635 (N.D. Ohio 2008) (same), *rev'd on other grounds*, 617 F.3d 833 (6th Cir. 2010); *Gerrard v. Parrish*, 2007 WL 151729, at *10 (D.N.J. Jan. 17, 2007) (same).

[2] In addition to the First, Third, Sixth, and Ninth Circuit decisions discussed above, the Second Circuit, in *Besser v. Walsh*, 601 F.3d 163, 183-84 (2d Cir. 2010), addressed this issue, held that finality was the cutoff, and believed that holding it was outcome determinative. The court later reheard that case en banc and decided that it did need to resolve the issue in that case after all. *See Portalatin v. Graham*, 624 F.3d 69, 81 n.6 (2d Cir. 2010), *pet'ns for cert. pending* (Nos. 10-8464, -8470 & -8502).

App. 23a – that "[t]his case is a suitable vehicle for resolution of this issue." State's Br. 17.

Lest there be any confusion, however, stemming from the State's rendition of the procedural history of this case in the state courts (State's Br. 1-5, 17-19), there can be no doubt that petitioner's Confrontation Clause claim is properly before the federal courts. A state prisoner's federal claim is preserved for review on federal habeas when it was either (a) fairly presented to the state courts, *see Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (per curiam); or (b) rejected by the state courts on the merits, *see Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991). The Third Circuit held that *both* of these things happened here. Pet. App. 15a. The State does not directly challenge those holdings. Nor could it.

a. As for fair presentation, the State suggests that there is a difference between arguing that the prosecution's introduction of a nontestifying codefendant's redacted confession violates the Confrontation Clause because of "contextual implication," and arguing that it violates the Clause because it is redacted by "the use of blanks." State's Br. 17-18. The State further contends that petitioner advanced only the former type of argument. *Id.* But the State's two formulations are simply two different ways of characterizing the same argument that this Court accepted in *Gray v. Maryland*, 523 U.S. 185 (1998) – namely, that the introduction of a confession that is redacted by mere blanks violates the Confrontation Clause because the blanks are bound to implicate the defendant in the context of the case. *See id.* at 191-96. At any rate, petitioner did complain in the Pennsylvania Superior Court

specifically about the method of redaction used in his case,[3] and he renewed that argument (with specific citations to *Gray*, since it had been decided at this point) in the Pennsylvania Supreme Court.[4]

b. As for the state courts' having addressed the argument, the State expressly acknowledges – as it did in its answer to petitioner's petition for habeas relief – that the Pennsylvania Superior Court rejected it on the merits. State's Br. 2 n.1; *see also* Pet. App. 9a-10a, 15a, 81a n.4. That court held that the Confrontation Clause was not violated because the codefendants' confessions "were redacted to remove any reference to the other defendants in the case." Pet. App. 9a. The court's failure to express concern about the use of blanks to redact the codefendants' confessions simply means that its holding is irreconcilable with *Gray*, not that its decision somehow did not constitute one on the merits.

4. *The Merits.* The State's arguments on the merits, of course, have little to do with whether certiorari is warranted in this case. Review is

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[3] Petitioner argued in the Pennsylvania Superior Court that the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968), is violated when "redaction would destroy the narrative integrity of the [codefendants'] statements, and prejudice the appellant in the case at bar," and he contended that he "did suffer such prejudice at trial." Appellant's Br. to Penn. Super. Ct. 23-24.

[4] Petitioner argued that "the redaction method used herein clearly left every indication of redaction and, therefore, did not satisfy the standard set forth in *Gray*." Appellant's Br. to Penn. S. Ct. 24, *available at* 1998 WL 34114494; *accord id.* at 16.

necessary primarily to resolve the circuit split over a basic question of federal habeas law. Nevertheless, flaws in the State's arguments show that certiorari also is warranted to reverse the decision below.

The State argues that the temporal cutoff for defining clearly established law should be the date of the last state-court decision on the merits because: (a) this Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002), holds that *Teague* and AEDPA mandate "distinct" inquiries that "bear[] only a slight connection" to each other; (b) the earlier cutoff date is necessary to give deference to state courts; and (c) a later cutoff date would "compel[]" state high courts to grant review whenever this Court has announced a new rule in the interim since the last state-court decision. State's Br. 9-13 (internal quotation marks and citations omitted). None of these arguments is convincing.

a. *Horn* validates petitioner's position, not the State's. Petitioner's central point is that AEDPA cannot be read to alter *Teague*'s prior construction of the federal habeas statute because AEDPA does not contain "a clear indication from Congress of a change in policy." Pet. 22 (quoting *Grogan v. Garner*, 498 U.S. 279, 290 (1991)); *see also United States v. O'Brien*, 130 S. Ct. 2169, 2178 (2010). *Horn*'s statements that AEDPA is distinct and unconnected to *Teague* simply reinforce the point that while AEDPA established a new substantive standard for deferring to state-court decisions, it was not meant to upend *Teague*'s finality cutoff date.

b. This Court's own decision in *Spisak* – in which it afforded AEDPA deference to a state-court decision issued before an intervening decision from this Court,

see 130 S. Ct. at 684 – demonstrates that it is unnecessary to set the cutoff for clearly established law at the time of the relevant state-court decision in order to give AEDPA deference to state courts' rejections of federal constitutional claims. "Under § 2254(d), a habeas court must determine what arguments or theories supported *or, as here, could have supported,* the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011) (emphasis added). As this Court made clear in *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam), and again in *Harrington*, 131 S. Ct. at 784, 786, applying that test does not require the state court to have mentioned – or even to have been aware of – an allegedly controlling decision from this Court; rather, it merely requires a federal court to imagine a state-court opinion rejecting that decision as controlling, and then ask whether that hypothetical opinion would have been unreasonable. By the same token, AEDPA's test does not require this Court's decision to have existed at the time of the state-court's decision.

c. Nothing about keeping the cutoff date at finality compels state high courts to grant review when this Court issues a new decision after a state intermediate court rejects a defendant's appeal. A state high court faced with such a situation has several choices. First, it can grant review and address the claim on the merits. Second, it can vacate the intermediate court's decision and order that court to reconsider the case in light of this

Court's intervening decision. *See, e.g., People v. Raby*, 775 N.W.2d 144 (Mich. 2009). Third, it can deny review, leaving the defendant, if he wishes, to seek relief from the federal courts – either by way of seeking certiorari in this Court (in which *de novo* review would apply) or habeas relief in a federal district court (in which AEDPA deference would apply). If a state high court chooses the third option and a federal district court later determines, in light of this Court's intervening decision, that no fair-minded jurist could have rejected the defendant's argument, then habeas relief is perfectly appropriate. That is the essence of the federal habeas statute.

The State insinuates that this framework penalizes a state high court when it foregoes review based on a procedural impediment to reaching a defendant's claim on the merits. State's Br. 12. It does not. If a state high court wishes to invoke a procedural reason for denying review, it is perfectly free to do so, and federal courts will honor that invocation. *See Ylst*, 501 U.S. at 803; *Harris v. Reed*, 489 U.S. 255, 264-65 (1989). Even if a state high court does not provide any reason for denying review, this Court held long ago that a federal court on habeas review may find a claim procedurally defaulted when the state intermediate court rejected the prisoner's claim on the merits but a procedural glitch became apparent in briefing to the state high court. *See Ylst*, 501 U.S. at 804-05; *Coleman v. Thompson*, 501 U.S. 722, 740 (1991).

The problem for the State is simply that it cannot make such a showing here. As the Third Circuit held, Pet. App. 15a, and as elaborated above, *supra* pp. 6-7, petitioner fairly presented that claim to the

Pennsylvania courts. Nothing in the Pennsylvania Supreme Court's order dismissing petitioner's appeal suggests otherwise. *Commonwealth v. Trice*, 727 A.2d 1113 (Pa. 1999). Under these circumstances, neither AEDPA nor any other tenet of federalism is implicated by a federal court's reaching the merits of a prisoner's claim and applying all of this Court's decisions that existed at the time his conviction became final – or, at the very least, when the state high court elected not to address his claim.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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AMICUS CURIAE BRIEF

RECORD
D
LIEFS

No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER, *ET AL.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

REASONS FOR GRANTING THE PETITION .. 2

ARGUMENT 3

I. THE THIRD CIRCUIT'S ANALYSIS WOULD BLUR THE BRIGHT-LINE RETROACTIVITY RULE OF *TEAGUE* V. *LANE*. 3

A. Important Policy Reasons Support This Court's Retroactivity Jurisprudence, Which Indentifies The Date A Conviction Becomes Final As The Boundary Between Old And New Rules. 4

B. Section 2254(d)(1) Does Not Discard *Griffin* And *Teague*. 5

C. The Third Circuit's Interpretation Of Clearly Established Federal Law Would Create A Class Of Petitioners Theoretically Entitled To Retroactive Application Of New Rules But Unable To Obtain Habeas Relief, An Would Add Unwarranted Complexity To Habeas Litigation..... 6

TABLE OF CONTENTS—continued

II. THE THIRD CIRCUIT'S RULE WOULD PLACE AN UNFAIR BURDEN ON INDIGENT PETITIONERS, WHO ARE GENERALLY UNREPRESENTED DURING ALL OR PART OF THE TIME BETWEEN THE LAST STATE COURT DECISION ON THE MERITS AND THE DATE THE CONVICTION BECOMES FINAL..... 8

III. BECAUSE A CLAIM BASED ON A NEW RULE ANNOUNCED AFTER THE LAST STATE COURT DECISION, OF NECESSITY, COULD NOT RECEIVE A STATE COURT RULING ON THE MERITS, A HABEAS COURT WOULD REVIEW THAT CLAIM *DE NOVO* AND THE THIRD CIRCUIT'S EXEGESIS OF THE PHRASE "CLEARLY ESTABLISHED FEDERAL LAW" UNDER 28 U.S.C. § 2254(D) WAS UNNECESSARY..... 12

CONCLUSION 14

TABLE OF AUTHORITIES

CASES Page

Birdsong v. *State*, 929 So.2d 1027 (Ala. Crim. App. 2005) 9
Commonwealth v. *Liebel*, 825 A.2d 630 (Pa. 2003) 9
Commonwealth v. *Padilla*, 253 S.W.2d 482 (Ky. 2008) 11
Commonwealth v. *Smith*, 818 A.2d 494 (Pa. 2003) 10
Douglas v. *State*, 631 S.E.2d 542 (S.C. 2006) 10
Ex parte Riley, 193 S.W.3d 900 (Tex. Crim. App. 2006) 10
Foxworth v. *St. Armand*, 570 F.3d 414 (1st Cir. 2009) 7
Garcia v. *United States*, 278 F.3d 1210 (11th Cir. 2002) 13
Gray v. *Maryland*, 523 U.S. 185 (1998) 7
Griffith v. *Kentucky*, 479 U.S. 314 (1987) 4, 7
Hathaway v. *State*, 741 N.W.2d 875 (Minn. 2007) 9
Horn v. *Banks*, 536 U.S. 266 (2002) 6
Kapral v. *United States*, 166 F.3d 565 (3d Cir. 1999) 7
Kargus v. *State*, 162 P.3d 818 (Kan. 2007) .. 9
Moore v. *Commonwealth*, 199 S.W.3d 132 (Ky. 2006) 9
Nichols v. *McCullough* ,2003 WL 22939367 (E.D. Pa. 2003) 13
Padilla v. *Kentucky*, ___ U.S. ___, 129 S.Ct. 1317 (Feb. 23, 2009) 11
People v. *Love*, 727 N.E.2d 680 (Ill App. 2d Dist. 2000) 9
Porter v. *McCollum*, __ U.S. ___, 130 S. Ct. 447 (2009) 12

TABLE OF AUTHORITIES—continued

	Page
Richardson v. *Marsh*, 481 U.S. 200 (1987)	12, 13
Rompilla v. *Beard*, 545 U.S. 374 (2005)	12
Small v. *State*, 920 A.2d 1024 (Conn. App. 2007)	9
Smith v. *Spisak*, 130 S.Ct. 676 (2010)	2
State ex rel. Schmelzer v. *Murphy*, 548 N.W.2d 45 (Wis. 1996)	9
State v. *Carter*, 757 N.E.2d 362 (Ohio 2001)	10
State v. *Mata*, 730 N.W.2d 396 (Neb. 2007)	10
Teague v. *Lane*, 489 U.S. 288 (1989)	2, 4, 5
United States v. *Gio*, 58 F. Supp. 2d 920 (N.D. Ill.1999)	13
United States v. *Sanin*, 252 F.3d 79 (2d Cir. 2001)	13
Wiggins v. *Smith*, 539 U.S. 510 (2003)	12
Williams v. *Cain*, 229 F.3d 468 (5th Cir. 2000)	2
Williams v. *Taylor*, 529 U.S. 362 (2000)	3, 5

STATUTES

28 U.S.C. § 2254	*passim*
28 U.S.C. § 2255	13
Tenn. Code Ann. § 40-30-106	10
Wash. Rev. Code Ann. §10.73.150	9

RULES

16A A.R.S. Crim. Pro. R. 32.4 (c)(2)	10
N.J. Ct. R. 2:7-2(a)	9
Pa. R. Crim. P. 122 & comment	9
Pa. R. Crim. P. 904(B)	10
42 Pa. C.S.A. § 2545(b)(1), (3)	10

INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that 28 U.S.C. § 2254 is applied in an even-handed and readily understood way. Amicus has a special interest in ensuring the statute's fair application to its many indigent clients, whose rights to state-funded counsel may expire at a time when they must make important litigation decisions affecting their rights to subsequent habeas relief.

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1 Pursuant to Rule 37, *amicus curiae* states that both parties have consented to the filing of this brief, and that no party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.2(a) *amicus curiae* certifies that timely notice was made to the counsels of record for both parties.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Third Circuit held in this case that a petitioner may not obtain federal habeas review of a claim based on "clearly established federal law" announced after the last state court ruling in the petitioner's case. Other Circuits will review claims based on rules announced at any time before the petitioners' convictions became final. Amicus concurs with petitioner's reasons for granting a writ of *certiorari*: the Courts of Appeals have reached divergent conclusions about the proper "cutoff date" for the announcement of a new rule available to habeas petitioners,[2] the question presented is of substantial importance because it arises frequently and will shape the conduct of state courts and litigants, and the Third Circuit majority's reasoning misconstrues the federal habeas statute.

Amicus also urges the Court to grant the writ in order to address the practical consequences of the Third Circuit majority's rule for its clients. First, the rule would contradict the retroactivity jurisprudence established in *Teague* v. *Lane*, 489 U.S. 288 (1989), creating confusion and arbitrary application in an area of habeas law that would otherwise be clear and well-understood. Second, the rule would have an unfair impact on indigent petitioners.

Finally, amicus urges the Court to grant *certiorari* to consider whether the Third Circuit majority's

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2 Greene's petition discusses the Circuit split that developed after this Court suggested, in *Smith* v. *Spisak*, 130 S.Ct. 676 (2010), that the appropriate cutoff date might be the date of the last state court decision on the merits. In addition, the Fifth Circuit has held, in a pre-*Spisak* decision in *Williams* v. *Cain*, 229 F.3d 468, 474 (5th Cir. 2000), that the correct date is the date the conviction becomes final.

exegesis of the meaning of "clearly established federal law" was unnecessary because the state court never ruled on the merits of petitioner's claim and, therefore, 28 U.S.C. § 2254(d) did not govern the claim at all

ARGUMENT

I. THE THIRD CIRCUIT'S ANALYSIS WOULD BLUR THE BRIGHT-LINE RETROACTIVITY RULE OF *TEAGUE* V. *LANE*.

The Third Circuit majority, following dicta offered by Justice O'Connor in one part of her opinion in *Williams* v. *Taylor*, 529 U.S. 362 (2000), held that a habeas petitioner may only obtain relief on the basis of a new rule if this Court has announced it by the date of the petitioner's last state court decision on the merits. That rule would add further confusion to the already complicated jurisprudence of federal habeas – by contradicting well-settled retroactivity principles, by arbitrarily discriminating among similarly situated petitioners, and by requiring courts and litigants to address two different cutoff dates to identify the controlling law. Whether the rule would thus undermine the fair and equitable administration of the federal habeas statute is an important consideration that should support a grant of *certiorari*.

A. Important Policy Reasons Support This Court's Retroactivity Jurisprudence, Which Identifies The Date A Conviction Becomes Final As The Boundary Between Old And New Rules.

In *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), this Court held that "a new rule for the conduct of

criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" *Id.* at 328. The Court identified two reasons for its holding. First, "as a practical matter," because it was impossible for the Court to hear every case presenting a particular claim, it would "fulfill [its] judicial responsibility" by directing lower courts to give cases pending on direct review the benefit of the new rule. *Id.* at 323. Second, making new rules retroactive to cases still pending on direct review at the time of their articulation would prevent "the *actual inequity* that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of the new rule. *Id.* (citation omitted; emphasis in original).

The Court addressed the other side of *Griffith*'s bright-line rule in *Teague* v. *Lane*, 489 U.S. 288 (1989), holding that habeas courts would not retroactively apply new post-finality rules to cases on collateral review unless one of two exceptions applied. *Id.* at 311. The Court stressed that collateral attacks should not substitute for direct appeal, and that states have a proper interest in leaving concluded litigation in a state of repose. *Id.* at 310. The Court's statement of its holding used finality, not the pendency of any direct appeal proceedings, as the dividing point between old and new rules: "[u]nless they fall within an exception to the general rule, new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." *Id.*

B. Section 2254(d)(1) Does Not Discard *Griffith* And *Teague*.

In *Williams* v. *Taylor*, 529 U.S. 362 (2000), a divided Court explained a provision of the Antiterrorism and Effective Death Penalty Act of

1996 ("AEDPA"), codified at § 2254(d)(1), which limits habeas courts' ability to grant relief to cases in which the state court rulings on the merits are "contrary to, or an unreasonable application of, clearly established federal law." In the course of addressing the meaning of the statutory terms, the Court considered whether this provision codified *Teague* or created a separate requirement. In a section of his opinion that did not command a majority, Justice Stevens concluded that § 2254(d) and the *Teague* rule were "functional equivalents" and that "Congress had congruent concepts in mind." 529 U.S. at 379-80. Therefore, he would have held, the phrase "clearly established federal law" did not modify *Teague* or its requirement that federal courts make an "independent evaluation" whether a rule was "clearly established." *Id.* at 383-84.

Justice O'Connor, writing for a majority, disagreed. In her view, § 2254(d) had "only a slight connection" to *Teague*. Her explanation of the differences, however, focused not on timing but on the substantive meaning of the requirements that the law be "clearly established," and that the state court ruling be "contrary to" or an "unreasonable application of" that law. *Id.* at 403-12, 413. She addressed the timing of the "clearly established" law only incidentally and inconsistently. On one hand, she introduced her discussion of the differences between *Teague* and § 2254(d)(1) with a reference to "the relevant state court decision," *id.* at 412, implying that a court could grant relief only on the basis of a rule clearly established by that date. On the other hand, she joined another part of Justice Stevens's opinion, which stated that "[t]he threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the

time his state-court conviction became final." *Id.* at 390.

In subsequent decisions, this Court has emphasized that *Teague* survives § 2254(d)(1), *see Horn* v. *Banks*, 536 U.S. 266 (2002), but it has never decided whether "old" rules under *Teague* and "clearly established" rules under § 2254(d)(1) have different timelines.

C. The Third Circuit's Interpretation Of Clearly Established Federal Law Would Create A Class Of Petitioners Theoretically Entitled To Retroactive Application Of New Rules But Unable To Obtain Habeas Relief, And Would Add Unwarranted Complexity To Habeas Litigation.

Under the Third Circuit majority's approach, a petitioner who exhausted a constitutional claim in state court, but was not vindicated by a new ruling of this Court until after the last relevant state court decision, could not obtain habeas relief even though he or she was entitled to retroactive application of the rule under *Teague*. While Justice O'Connor's majority opinion in *Williams* and the per curiam opinion in *Horn* v. *Banks* make clear that the tests of *Teague* and § 2254(d)(1) are distinct and that a habeas court must apply both tests, they should apply in a temporally parallel way, with the same cutoff date. That would avoid the anomalous and unjust result that a petitioner entitled to benefit from a retroactive rule could not obtain relief because the legal event on which he or she relied – the announcement of the new rule – occurred after the last state court decision in the case.

Indeed, the Third Circuit majority's approach to the collateral application of *Gray* v. *Maryland*, 523 U.S.

185 (1998), would thwart the policies underlying *Griffith*. It would be unjust for this Court to have plucked Gray from a pool of similarly situated defendants – including the petitioner in this case – and to have granted relief to Gray without granting relief to the others. *Griffith*, 479 U.S. at 323; *see Foxworth* v. *St. Armand*, 570 F.3d 414, 432 (1st Cir. 2009) ("The construct advocated by the respondent would allow a state court to subvert *Griffith* and deny criminal defendants the benefit of new Supreme Court precedent by the simple expedient of summarily affirming a lower court's decision."). As the dissenting judge in the Third Circuit observed, the panel majority's approach would create a "twilight zone between the last state-court decision on the merits and the date of finality." Pet. App. 50a n. 6 (Ambro, J., dissenting).

Further, the rule applied by the Third Circuit majority would make an already confusing habeas statute both more confusing and more arbitrary. Before reaching the merits and in addition to addressing questions of timeliness, exhaustion, and default, courts and litigants would have to determine whether the controlling law was announced both before finality and, even if so, before the last state-court decision. *Cf. Kapral* v. *United States*, 166 F.3d 565, 572 (3d Cir. 1999) ("[I]t would make little sense for § 2255's one-year limitation on collateral proceedings to begin to run before a legal event that may give rise to a claim for collateral relief – i.e., the announcement of a new rule – has occurred.").

NACDL has a strong interest in ensuring the evenhanded construction and application of AEDPA, and in preserving the ability of its members' clients to obtain federal habeas review to which they are entitled. The Third Circuit's construction of "clearly

established federal law" would arbitrarily deny review to petitioners who should receive it.

II. THE THIRD CIRCUIT'S RULE WOULD PLACE AN UNFAIR BURDEN ON INDIGENT PETITIONERS, WHO ARE GENERALLY UNREPRESENTED DURING ALL OR PART OF THE TIME BETWEEN THE LAST STATE COURT DECISION ON THE MERITS AND THE DATE THE CONVICTION BECOMES FINAL.

The Third Circuit majority's rule would have an onerous impact on indigent petitioners. Under its interpretation of "clearly established federal law," a petitioner could only obtain review on the basis of a new rule announced after the last state court decision, but before the conviction was final, by petitioning this Court for *certiorari*. But the right to state-funded counsel generally expires before a conviction becomes final. Thus, only indigent petitioners blessed with considerable forensic skill and luck could have any hope of vindicating their rights under newly announced rules.

Petitioner Greene was prosecuted and convicted in Pennsylvania. That state, like others, provides counsel for indigent defendants for all avenues of direct appeal, through the seeking of discretionary review (and further proceedings if review is granted) in the Pennsylvania Supreme Court. *See* Pa. R. Crim. P. 122 & comment (counsel retains appointment through final judgment, including appeal through Supreme Court of Pennsylvania);

Commonwealth v. *Liebel*, 825 A.2d 630, 633 (Pa. 2003).[3]

Many other states do not provide counsel to indigent defendants seeking discretionary review in the highest state court, but only provide counsel through the first appeal as of right.[4] Although many

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3 *See also Kargus* v. *State*, 162 P.3d 818, 824 (Kan. 2007) (concluding that Kansas Legislature intended that a defendant's right to counsel in direct appeal of felony conviction extends to all levels of state appellate process, including filing of petition for review); N.J. Ct. R. 2:7-2(a) (providing counsel to indigents for appeal from the conviction and "such post-conviction proceedings or appeal therein as would warrant the assignment of counsel"); Wash. Rev. Code Ann. §10.73.150 (providing counsel for indigents to pursue state court discretionary review in some circumstances); *State ex rel. Schmelzer* v. *Murphy*, 548 N.W.2d 45, 47-48 (Wis. 1996) (defendant has statutory right to counsel for petition for discretionary review).

4 *See Birdsong* v. *State*, 929 So.2d 1027, 1028 (Ala. Crim. App. 2005) (criminal defendant not entitled to counsel on discretionary appeal to Alabama Supreme Court); *Small* v. *State*, 920 A.2d 1024, 1026-27 (Conn. App. 2007) (no Sixth Amendment right to counsel for discretionary review following first appeal of right); *People* v. *Love*, 727 N.E.2d 680, 683 (Ill App. 2d Dist. 2000) (constitutional right to counsel applies through trial and first appeal of right, and no further); *Moore* v. *Commonwealth*, 199 S.W.3d 132, 136 (Ky. 2006) (constitutional right to counsel limited to first direct appeal and not to discretionary appeals or collateral attacks); *Hathaway* v. *State*, 741 N.W.2d 875, 880 (Minn. 2007) (petitioner's right to counsel under state constitution satisfied by assistance of counsel in one appeal); *State* v. *Mata*, 730 N.W.2d 396, 481-82 (Neb. 2007) (right to counsel does not extend to discretionary appeals to state's highest court); *State* v. *Carter*, 757 N.E.2d 362, 363 (Ohio 2001) (right to appointed counsel in criminal matter extends to first appeal as of right, and no further); *Douglas* v. *State*, 631 S.E.2d 542, 543 n.1 (S.C. 2006) (no constitutional right to effective assistance when seeking discretionary appellate review); *Ex parte Riley*, 193 S.W.3d 900, 902 (Tex. Crim. App.

states, including Pennsylvania, appoint counsel to prisoners to pursue postconviction or collateral relief, the appointment generally does not occur until after the prisoner has filed the collateral pleading, well after direct review has concluded and the conviction is final.[5]

Thus, in some states, a prisoner will be completely unrepresented after intermediate appellate review. Even in states like Pennsylvania that provide counsel through the end of discretionary state review, the representation ends when the *certiorari* process begins, an interval that often lasts more than six months.[6] Further, even states that appoint counsel for collateral review generally do so only after the filing of the state post-conviction petition, well after the conviction is final.

As a result of the porous condition of the states' provisions for appointed counsel, the Third Circuit majority's cutoff date would unjustly disadvantage indigent petitioners. The rule would provide only one

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2006) (while defendant has right to file petition for discretionary review, no right to appointed counsel to assist in filing petition).

5 *See* 42 Pa. C.S.A. § 2545(b)(1), (3) (petition must be filed within one year of date judgment becomes final at conclusion of discretionary review in Supreme Court of United States); Pa. R. Crim. P. 904(B) (providing for appointment of counsel for indigent defendant following initiation of post-conviction proceedings); *Commonwealth* v. *Smith*, 818 A.2d 494, 498-501 (Pa. 2003) (indigent first-time post-conviction petitioner entitled to assistance of counsel); *see also, e.g.*, 16A A.R.S., Crim. Pro. R. 32.4 (c)(2) (providing for appointment of counsel for initial postconviction petitions); Tenn. Code Ann. § 40-30-106 (court may appoint postconviction counsel upon determination that petitioner is indigent and in need of counsel).

6 *Compare, e.g., Commonwealth* v. *Padilla*, 253 S.W.2d 482 (Ky. June 19, 2008) (denying reh'g) *with Padilla* v. *Kentucky*, ___ U.S. ___, 129 S.Ct. 1317 (Feb. 23, 2009) (grt'g cert.).

very narrow avenue of review that would require skill and speed to navigate. Unrepresented, and generally incarcerated, petitioners would have to learn of the new rule in time to seek *certiorari*. In addition, they would have to possess sufficient legal knowledge to understand that, although this Court had just announced the new rule, the only way to claim its benefit was to present the identical claim to this Court instead of filing a habeas petition.[7]

The unjust impact of the Third Circuit majority's cutoff rule on indigent petitioners is an important consideration that, with the other reasons set forth above, should support a grant of *certiorari*.

III. BECAUSE A CLAIM BASED ON A NEW RULE ANNOUNCED AFTER THE LAST STATE COURT DECISION, OF NECESSITY, COULD NOT RECEIVE A STATE COURT RULING ON THE MERITS, A HABEAS COURT WOULD REVIEW THAT CLAIM *DE NOVO* AND THE THIRD CIRCUIT'S EXEGESIS OF THE PHRASE "CLEARLY ESTABLISHED FEDERAL LAW" UNDER 28 U.S.C. § 2254(D) WAS UNNECESSARY.

The Third Circuit's decision implicates another important question of statutory construction which neither the panel majority nor the dissent discussed. 28 U.S.C. § 2254(d) limits a habeas court's ability to grant relief "with respect to any claim that was

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7 The Third Circuit's cutoff rule would have practical implications. First, any state that cared at all about fairness would have to change its appointment-of-counsel rules to ensure that appellate counsel followed the case all the way to finality. Moreover, the rule would prompt habeas petitions from indigent prisoners in Greene's position asserting ineffective assistance of counsel on direct review

adjudicated on the merits in State court proceedings." If the state court did *not* adjudicate the claim on the merits, however, a habeas court must review it *de novo* (as long as the petitioner encounters no other obstacles to relief such as untimeliness, non-exhaustion, or default). *See, e.g., Porter* v. *McCollum*, __ U.S. ___, 130 S. Ct. 447, 452 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim *de novo*."); *Rompilla* v. *Beard*, 545 U.S. 374, 390 (2005); *Wiggins* v. *Smith*, 539 U.S. 510, 534 (2003)). In petitioner Greene's case, the state courts never ruled on the merits of his *Gray* claim, and he should have received *de novo* review of the claim in the federal courts.

The intermediate appellate court that ruled on petitioner's *Bruton* claim applied *Richardson* v. *Marsh*, 481 U.S. 200 (1987), and held that the redactions of the codefendants' statements effectively cured the Confrontation Clause problem. Pet. App. 9a-10a. *Richardson* reserved judgment on the question later resolved in *Gray* v. *Maryland*: the admissibility of a codefendant's confession in which the defendant's name has been replaced with a symbol or neutral pronoun. *See Richardson*, 481 U.S. at 211 n. 5. *Gray* announced a new rule of criminal procedure establishing that such redactions are ineffective to cure a Confrontation Clause violation. *See Garcia* v. *United States*, 278 F.3d 1210 (11th Cir. 2002) (*Gray* rule not retroactively available under *Teague*); *United States* v. *Gio*, 58 F. Supp. 2d 920, 924 (N.D. Ill.1999) ("the rule in *Gray* is a new constitutional rule of criminal procedure"); *Nichols* v. *McCullough* ,2003 WL 22939367, 10 (E.D. Pa. 2003) ("To the extent that *Gray* could be said to command a different result than *Bruton* and *Richardson*, we find

that it would amount to a new rule of law that cannot be applied here.").[8] Petitioner was entitled to benefit from *Gray* because his conviction was not yet final when it was announced. Yet, because the Pennsylvania Supreme Court dismissed his case, determining that it had improvidently granted discretionary review, he never received a ruling on the merits of the *Gray* claim he presented in that court.

Consequently, the Third Circuit unnecessarily ruled against petitioner on the ground that *Gray* was not "clearly decided" at the time of the last state court decision, as §2254(d) would require if that section of the habeas statute governed his claim. The Circuit failed to consider whether §2254(d) was operative at all. Because no state court ruled on the merits of petitioner's *Gray* claim, it was not. Furthermore, because petitioner timely exhausted his state remedies on that claim by raising it promptly and in a procedurally appropriate manner in the state Supreme Court, he was entitled to *de novo* review of the claim on habeas review.

Whether §2254(d) applies to petitioners in Eric Greene's position is an important question that should support a grant of *certiorari*.

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8 *Cf. United States* v. *Sanin*, 252 F.3d 79, 80 (2d Cir. 2001) (*Gray* did not announce new rule and was thus unavailable in collateral attack pursuant to 28 U.S.C. § 2255).

CONCLUSION

Respectfully submitted,

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JOINT APPENDIX

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN 17 2011
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No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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Opinion of the United States Court of Appeals
for the Third Circuit, dated March 8, 2010..... 1a

TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Record of Proceedings, August 14, 1995..... 3

Brief for Appellant to the Superior Court of Pennsylvania..... 29

Letter Brief for Appellee to the Superior Court of Pennsylvania..... 75

Memorandum Opinion of the Superior Court of Pennsylvania..... 120

Petition for Allowance of Appeal 132

Order of the Supreme Court of Pennsylvania, Granting Petition for Allowance of Appeal..... 156

Brief for Appellant to the Supreme Court of Pennsylvania..... 157

Brief for Appellee to the Supreme Court of Pennsylvania..... 183

Order of the Supreme Court of Pennsylvania, Dismissing Appeal 216

* * * * *

The following opinions have been omitted in printing this joint appendix because they appear on the following pages of the Appendix to the petition for certiorari:

Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania, dated April 2, 2007 ..... 72a

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2:04-CV-05200

Eric Greene, also known as Jarmaine Q. Trice,
petitioner,
v.
John A. Palakovich, *respondent*.

11/08/2004 – [1] – Petition for writ of habeas corpus filed.

07/06/2006 – [13] – Response to petition for writ of habeas corpus filed.

09/30/2005 – [16] – Response to respondent's response to petitioner's writ of habeas corpus filed.

01/26/2006 – [18] – Report and recommendation for denial of habeas corpus petition; recommendation for issuance of certificate of appealability with respect to petitioner's Sixth Amendment claim.

03/23/2006 – [28] – Objection to report and recommendations by State.

04/02/2007 – [30] – Report and recommendation approved and adopted; petition for writ of habeas corpus denied;

certificate of appealability issued on petitioner's confrontation clause claim only.

04/13/2007 – [31] – Notice of appeal filed by Greene.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

07-2163

Eric Greene, also known as Jarmaine Q. Trice, *appellant*,

v.

John Palakovich, *appellee*.

05/28/2010 – Opinion of the Third Circuit, affirming denial of habeas petition.

07/02/2010 – Petition for rehearing filed by Greene.

07/20/2010 – Order denying panel rehearing and rehearing en banc.

07/22/2010 – Order amending dissenting opinion.

04/06/2011 – Petition for writ of certiorari granted.

IN THE FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA

CRIMINAL DIVISION OF THE COURT OF
COMMON PLEAS

PHILADELPHIA, PENNSYLVANIA

THE COMMONWEALTH OF PENNSYLVANIA	)	RECEIVED OCT 25 Clerk of Quarter Sessions	
v.	)		
JARMAINE TRICE	)	9506-0118	1/6
NAREE ABDULLAH	)	9506-0118	2/6
JULIUS JENKINS	)	9506-0018	3/6 & 4/6
ATIL FINNEY	)	9506-0118	5/6
GREGORY WOMACK	)	9506-0118	6/6

August 14, 1995
10:00 a.m.
Courtroom 625

BEFORE:

THE HONORABLE CAROLYN ENGEL TEMIN

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[3]

PROCEEDINGS

THE COURT: Next matter, please.

THE CRIER: If I may, Your Honor, Numbers 16, 17, and 18, 19, 20, 21 and 22 on the list. Jarmaine Trice is represented by Mr. Moldovsky; Naree Abdullah is represented by Mr. Medway; Atil Finney is represented by Mr. Siegel; Julius Jenkins is represented by Mr. Ibrahim; and Gregory Womack is represented by Mr. Rudenstein.

ALL ATTORNEYS: Good morning, Your Honor.

THE COURT: Good morning. One moment, please.

MR. MEDWAY: We are here, Your Honor, because of a Motion to Sever. Mr. Moldovsky filed a Motion to Sever.

THE COURT: Yes. Is everybody in joining that?

MR. MEDWAY: Except for Mr. Ibrahim.

THE COURT: Do I understand, Mr. Ibrahim, you're not seeking to have your case severed in this matter?

MR. IBRAHIM: That's correct, Your Honor.

THE COURT: From anyone. But all other defendants are seeking to sever.

I do have the notes of testimony from the [4] preliminary hearing, and I will hear your argument at this time.

Is one person going to argue, or is everybody going to make argument, or what?

THE CRIER: Your Honor, Mr. Ibrahim has a request of Your Honor. If we could handle his discovery.

THE COURT: Yes. One moment, Mr. Ibrahim.

I'm sorry. Did you file a motion with the Court?

MR. IBRAHIM: No, Your Honor, it's actually not a Motion for Discovery. I filed an informal request for additional information.

THE COURT: I don't think you set [sic] me a copy because I don't have that.

MR. IBRAHIM: I brought a copy for the Court.

THE COURT: Very well.

MS. RUIZ: Good morning, Your Honor. Yvonne Ruiz for the Commonwealth.

THE COURT: Are you the specially assigned ADA on this matter?

MS. RUIZ: Yes, Your Honor.

THE COURT: Very well. Have you had a chance to review Mr. Ibrahim's letter of August 1st?

MS. RUIZ: Yes, Your Honor, and Mr. Ibrahim [5] and I had an opportunity this morning to review his request.

Your Honor, with respect to his letter dated August 1, 1995, Numbers 1 through 5, I have informed Mr. Ibrahim this morning that I would make the photo arrays available to Mr. Ibrahim. I had indicated to him that within the next two weeks is a good time for me, because after that I will be on vacation. He indicated his [sic] is not available the next two weeks, so therefore, Judge, we will have to do it when I get back from my vacation.

THE COURT: Very well. We will note photos to be made available. We will note RE: discovery letter of 8/1/95. Photos to be available when ADA Ruiz returns from vacation.

Now, as to the next paragraph?

MS. RUIZ: Your Honor, as to Number 6, I indicated to Mr. Ibrahim that I would provide him with Mr. Drummond's FBI extract. I did not have the FBI extract available at the preliminary hearing. I only had his local record.

THE COURT: All right.

MS. RUIZ: Your Honor, as to Number 7, I will keep him informed as to that. [6]

THE COURT: Very well.

MS. RUIZ: Your Honor, I would like the record to note that with respect to the photographs, they would have been made available within the next two weeks, but it is just that Mr. Ibrahim is not available.

THE COURT: I understand.

MS. RUIZ: Thank you, Judge.

THE COURT: Does that dispose of your discovery problems in your case, Mr. Ibrahim?

MR. IBRAHIM: Yes, my discovery request up to this point is complete. If anything comes up, I will proceed in the same format that we followed today.

THE COURT: Very well.

MR. MOLDOVSKY: Your Honor, as to the matter of discovery, if there are any plea agreements with the two people who testified –

THE COURT: Well, you're obviously entitled to that, Mr. Moldovsky. You don't have to request it. It's always given as a matter of course.

MS. RUIZ: That's correct.

MR. IBRAHIM: Ms. Ruiz said she would keep me advised.

THE COURT: All right. As to Mr. Jenkins, [7] Counsel, when will you return?

MS. RUIZ: Judge, I will be back in the office on September 21.

THE COURT: And when are you leaving on your vacation?

MS. RUIZ: Labor Day.

THE COURT: And, Mr. Ibrahim, you're on vacation until Labor Day; is that correct?

MR. IBRAHIM: Actually, I start a trial in federal court.

THE COURT: So you're not available for the next two weeks; is that correct?

MR. IBRAHIM: That's right, Your Honor.

THE COURT: So, we would have to list this case after September 20th?

MS. RUIZ: That's correct, Judge.

THE COURT: What day of the week is September 20? Is that a Monday?

MR. MOLDOVSKY: Rosh Hashanah. Wait a minute, Rosh Hashanah is the following Monday.

THE COURT: So, you will be back on the 20th?

MS. RUIZ: Judge, I'll be back in the office that Friday, right before Rosh Hashanah.

MR. MOLDOVSKY: The 22nd.

MS. RUIZ: The 22nd. [8]

MR. FOY: That's the bench bar that day.

THE COURT: What is the next possible date to list this matter?

MR. MOLDOVSKY: The 28th, Thursday.

THE COURT: We will note that due to counsel unavailability and Rosh Hashanah, this is continued to 9/28/95.

MR. MEDWAY: Excuse me, Your Honor.

THE COURT: Yes.

MR. MEDWAY: I will be unavailable until after the 30th.

THE COURT: Very well. Let's list this for October 1st.

MR. MEDWAY: Thank you.

MR. MOLDOVSKY: October 1st is a Sunday. You mean the 2nd of October, Judge.

THE COURT: Thank you. October 2, 1995. That will be excludable time.

MS. RUIZ: Judge, will that be listed in here for status?

THE COURT: In Room 604 in the Criminal Justice Center.

MS. RUIZ: In Room 604. Thank you.

MR. MOLDOVSKY: Do we know the phone number for Room 604? [9]

THE COURT: No. We will not know that. As far as I do know, we will not know the phone number until September 5th, and all of that information, as I understand it, will be widely publicized in the Legal Intelligencer and other publications, so it should be available to anyone in Philadelphia fairly easily.

MR. MOLDOVSKY: Judge, will that be what you call a ready pool conference or a plea conference?

THE COURT: No, this will be a status conference.

MR. MOLDOVSKY: That's fine.

THE COURT: I have discontinued the practice of former calendar judges calling the second listing some sort of a plea conference. Pleas should come at any time.

MR. IBRAHIM: Judge, that's all I have.

THE COURT: Mr. Ibrahim, you're excused. Thank you.

THE COURT: Now, Mr. Moldovsky, will you be arguing?

MR. MOLDOVSKY: Yes.

Judge, before I begin, I just want to mention – I talked to Mr. Foy – you have this morning the two leads. My Tran is the third. [10]

THE COURT: Yes.

MR. MOLDOVSKY: I told him my guy doesn't have to be here and I will take any kind of trial they want.

THE COURT: You're ready?

MR. MOLDOVSKY: I'm ready.

THE COURT: The other two will be ready for a possible ready pool at the next listing.

MR. MOLDOVSKY: Do I have to be here at the next listing? They made it for August 28th, and I will be in New York.

THE COURT: You will not be available that day? I will be away on the 27th, 28th, and 29th. However, I can tell you –

THE COURT: What number is Mr. Moldovsky's case?

THE CRIER: Number 13, Your Honor.

THE COURT: All right. We will note defense counsel ready.

MR. MOLDOVSKY: For anything they want.

THE COURT: Mr. Moldovsk[y], you keep saying that, but it's not really true. I don't mean you misrepresented anything to the Court, and I'm sure you mean to be cooperative, but if we give you a date when you're not available, that's not any [11] good.

We will just note defense counsel ready and will not be available at next listing. So you can call in and find out what happened, Mr. Moldovsky.

MR. MOLDOVSKY: I will do that.

THE COURT: We won't have a ready pool conference without you. This be continue to 8/28 to keep it with the other defendants.

MR. MOLDOVSKY: If you want to do it two days later, I could call the other two lawyers and we could all be here.

THE COURT: All right. Why don't you let us know?

MR. MOLDOVSKY: The 30th will be fine.

THE COURT: All right. We will make it the 30th.

MR. MOLDOVSKY: I will personally call both the other two lawyers.

THE COURT: We will change that as to all three defendants.

MR. MOLDOVSKY: Thank you, Your Honor. That's of course here?

THE COURT: Yes, that will be here.

MR. MOLDOVSKY: I'll take care of that.

THE COURT: Thank you. [12]

[MR. MOLDOVSKY]: Your Honor, on behalf of Jarmaine Trice, I'm prepared to go forward.

THE COURT: Just a moment. When Mr. Moldovsky finish[es], the other counsel can argue if they so wish.

Now, Mr. Moldovsky, what is the basis on which you're asking for a severance?

ARGUMENT

BY MR. MOLDOVSKY:

Your Honor, I have a number of bases, and I intend to give a very cogent and a very easily understood one.

The gentleman who just left, Mr. Ibrahim, whose client, Julius Jenkins, is charged with murder in the first degree, and for whom the Commonwealth has indicated they were going to seek the death penalty, and if that has changed, I would like to be so advised.

MS. RUIZ: It has not changed.

MR. MOLDOVSKY: Since all the co-defendants have been held for murder in the second degree –

THE COURT: – Are you only asking for severance from Mr. Ibrahim's client?

MR. MOLDOVSKY: To begin with, I am just asking for a severance for this purpose right now. [13]

It seems unfair to have a death qualified jury when four of the five co-defendants are not facing a death penalty. There are all sorts of different questions and thought in a different atmosphere. I don't even want to get into whether or not you pick a more conviction prone [sic] because that's been thrown about for years.

But just short and sweet, Your Honor, that's one argument.

Your Honor should understand that this was what's known as a felony murder in that a grocery store – a small grocery store – was the subject of a robbery.

Now, allegedly, not to the victims, but there was a gentleman who owned the store, who was shot, and there were at least two women relatives all Oriental, I might, and none of whom identified my client.

But from the statements of the co-defendants, or more precisely Atil Finney, who is represented by Mr. Siegel, gave a statement and in the statement he said that my client took the cash register.

THE COURT: Are you saying the eye witnesses did not identify your client, but that the [14] identification of your client comes from the statement of the co-defendant?

MR. MOLDOVSKY: Yes, I am saying that. I am sure the District Attorney would correct that if I am mistaken.

MS. RUIZ: I'm sorry, Your Honor. I don't know if the Court wants me to correct that right now or not.

THE COURT: I'll give you a chance to argue later.

Mr. Moldovsky, you're saying from statements of the same defendant, Mr. Finney?

MR. MOLDOVSKY: From statements of the co-defendants, and I might add from a couple of other people – no, no, from one other person, who allegedly was in the car from which these men alighted.

A gentleman testified by the name of Demond Jackson, and Demond Jackson I'm not getting into because he gave a statement claiming someone else carried the register and then showed up at the preliminary hearing and said my client did.

I only add that because the District Attorney said she wanted to correct that. Nobody inside the store identified my client. No [15] customer, no persons.

MS. RUIZ: Judge, that's correct. No on[e] inside the store identified Mr. Moldovsky's client.

Your Honor, I don't know if it would help or not, but I have extra copies of each of the defendant's statements.

THE COURT: Well, there's an issue about that, and the issue is whether, in deciding whether or not to sever, I have to – or should I not assume that those statements are not admissible against any defendant who is tried together with another defendant.

In other words, I think I should see the statements. Would Defense counsel agree, they may be relevant on the issue of severance?

MR. MOLDOVSKY: Absolutely, and Your Honor, I would go a step further. If they weren't going to introduce those statements against the respective defendants, I wouldn't be seeking a severance.

I am seeking it for the second reason, because my client, who gave no statement, and Mr. Medway's client gave no statement and we're not seeking a severance. Mr. Medway's client's name is Naree Abdullah. [16]

THE COURT: Yes.

[MR. MOLDOVSKY]: We two are not seeking a severance at all, as long as they are not seeking a death penalty against our clients, and our clients gave no statements.

THE COURT: So, [y]ou're seeking severance from everyone, except Abdullah.

MR. MOLDVOSKY: Yes.

And with regard to the other three defendants, all of them – the other three gave a statement, and those other three statements have my client taking the cash register.

THE COURT: Well, obviously, those statements can't be used against your client if you're charged together with those other defendants, and they can't be used at all if you're tried separately, unless those defendants testify in person.

MR. MOLDOVSKY: That's always a chance. Now my position is that they can't successfully redact them, because they are interlocking, in the sense that, One, Mr. Demond Jackson, who has not been charged with anything, though he did sign a statement that said another person took the register, at the preliminary hearing, and I wasn't [17] permitted to cross-examine on why he changed his mind. The objection of the District Attorney was sustained. He said that my client arrived back in the car with the

cash register, and two of the co-defendant's statements say specifically that my client did, so that they are interlocking.

And, of course, the third statement said –

THE COURT: – Well, how are they interlocking? In other words, the co-defendants' statements, since they are introduced at trial and the co-defendants don't take the stand, and the statement says that X took the cash register, so that the only evidence identifying your client as taking the cas[h] register will be from this other witness who was not in the store, whom you will claim can be impeached with his statement.

MR. MOLDOVSKY: If three co-defendants' statements are read, and they say Mr. X took the cash register, and Demond Jackson testifies, as he did at the preliminary hearing, and Your Honor has the notes, that my client, Jarmaine Trice, took it, to my way of –

THE COURT: – So, you're saying the jury will assume that X –

MR. MOLDOVSKY: – That interlocks. [18]

THE COURT: – is the – Well, that's if they are redacted that way.

MS. RUIZ: That's correct, Your Honor.

THE COURT: They could be redacted otherwise.

MR. MOLDOVSKY: Well, I will point out one other nuance to you which, if Your Honor rules against me, but makes a redaction ruling on that one point –

THE COURT: – Well, I'm not ready to make a redaction ruling. But let me ask you a hypothetical.

It's unusual to do this, but suppose the statement is redacted to say, "I didn't take the cash register." In other words, each defendant's statement would state –

MR. MOLDOVSKY: I didn't take it.

THE COURT: – "I didn't. Someone else took the cash register."

MR. MOLDOVSKY: There's another nuance that I want Your Honor to know because your suggestion is brilliant. I just want to factor in one more thing.

Of the three co-defendants who gave statements, indeed, Atil Finney says that my client took the cash register and Mr. Gregory Womack made the statement that my client was [19] involved in that, but believe it or not, Julius Jenkins says that someone entirely different – he says that either Naree or another person, and I'll [t]ell you in one second, took the cash register, either Womack or Naree, so you have Mr. Jenkins saying specifically that one of two other people took it – people involved, I might add, but not mine.

THE COURT: Well, then, in that case, they are not interlocking. One statement would say X took the cash register, and the other would say Y and Z took it; and then you get the non-defendant witness who says their client took it, but the jury has information that three different people have been named as having taken the cash register.

So, how does that pin point your client?

MR. MOLDOVSKY: Well, Your Honor, it sounds excellent when you're saying it, but if you were sitting as the trial Court, I don't know that the trial Judge is going to instruct the District [A]ttorney to have the

detectives read: this person says that A took it, and this person says that another person we will call B took it, and this other person, the third person, doesn't say who took it, just that someone – [20]

THE COURT: – Well, if the statements were redacted, and I have never myself ha[d] such a redaction problem, such as you posit, but it seems to me that the fair way to redact these three different letters, is to refer to three different people.

MR. MOLDOVSKY: As long as I would be allowed to argue in my closing speech that you heard what you heard and you heard that there were different people, then I would have no problem with –

THE COURT: So that, in itself, would not be a reason for that?

MR. MOLDOVSKY: Agreed, and, of course, then I fall back to the first issue about the death penalty.

Of course, if they didn't seek the death penalty for Mr. – Jeremy's client, it wouldn't need to be done.

THE COURT: Do you know of any case law that supports your argument that severance is required; it's usually discretionary, but I wonder if you have a case where a case was severed because one defendant was subject to a death penalty.

MR. MOLDOVSKY: I don't, Your Honor.

THE COURT: It's clear we try cases all the time where it's one and one, or one defendant and [21] two co-defendants, and one is a capital case and one isn't, and we try them together all the time.

MR. MOLDOVSKY: I have never had one.

THE COURT: In fact, I found one in another county where one was a waiver at pre-trial and they tried them together, and the jury was instructed that after the jury comes back with a verdict on defendant A, the Judge would render a verdict on defendant B.

I'm not saying that is advisable, but there are all kinds of things that are done.

MS. RUIZ: Judge, I have not found –

THE COURT: I'm sorry. Let me find out if there are any other people who want to argue on this issue.

Is there anybody else who wants to argue on this issue?

MR. SIEGEL: Your Honor, I –

THE COURT: I take it, Mr. Moldovsky.

MR. SIEGEL: Your Honor, I simply want to say in regard to the Motion to Sever, the only part I joined is the first part that deals with the issue of joining non-death penalty cases with death penalty cases. I will just note that in the instance you just describe, I believe, if I [22] understood you correctly, you described two different fact finders, and the judge is doing the waiver part and the jury is doing it[s] own jury finding.

THE COURT: In the same trial.

MR. SIEGEL: In the same trial. Granted. But here it's the same jury.

THE COURT: Yes, I know that. Our rule in Philadelphia says if anybody wants a jury, everybody get[s] a jury. And I think it's a better rule. They are now going to follow that rule in that county.

MR. SIEGEL: What we're suggesting would be two different juries.

THE COURT: I understand that, but as I understand it, Mr. Moldvosky and Mr. Medway are only asking for severance from everybody except their two defendants; that they are satisfied with their two defendants being tried together, but Mr. Moldovsky is willing to concede that if the redaction can be done so it doesn't nail his client as the person taking the cash register, then his only issue is the death penalty.

Mr. Medway?

MR. MEDWAY: That is correct, Your Honor. One [23] of the problems that I see with redaction is if we go to A, B, C, D, and E as letters, and you have five defendants and five letters, it's a simple matter, coupled with the testimony of Mr. Wilson, for the jury to potentially, and I think it's a large potential for the jury to so say: that's A, my client is B, and Mr. Siegel's client is C, so on and so forth.

THE COURT: I thought that you were going to argue, Mr. Medway, that your client, that although there seems to be no evidence, other than the one stated that your client did it, that when the outside witness gets up and testifies that it was in, in fact, Mr. Moldovsky's client, the jury could assume that any one of A, B, C, or D was Mr. Moldovsky's client, except they would have to do one of those little puzzle things, and they could figure out it was someone, not the person testifying, that they were testifying against someone, and that could be potentially a problem.

Ms. Ruiz you can address yourself to that.

In other words, as I understand it, each of the two co-defendants of Mr. Moldovsky's client says –

MR. MEDWAY: – has identified him as taking [24] the cash register.

THE COURT: Well, the one defendant – I'm sorry.

MS. RUIZ: Judge, what happened here, Atil Finney, in his statement, in fact, identifies the three that goes in uses them by name, and says that, in fact, Mr. Moldovsky's client was the one who carries out the cash register.

THE COURT: But other co-defendants have said it was other people.

MS. RUIZ: Well, no, Judge. Gregory Womack says the three go in, but doesn't identify specifically who took the cash register.

Julius Jenkins, whose statement Your Honor, I don't intend on using his statement, does, in fact, identify someone else.

MR. MOLDOVSKY: What she says is correct, Your Honor.

THE COURT: So, you're not going to use Jenkins.

MS. RUIZ: But in all likelihood I'm not, since I have two identifications as his being the shooter, by the two witnesses in the store; so I probably won't use his statement, because it actually hurts me more than anything else.

[25] Therefore, Judge, you still have six people: three in the car and three that actually go in, and, Judge, it is the Commonwealth['s] position that you can redact, maybe not using A, B, and C, but if you use

the term "the other guys." That in fact, there is still the evidence still in redacting, would not just implicate Mr. Moldovsky's client, because there are five people who participated.

THE COURT: Mr. Moldovsky says if only his client was identified as taking the cash register, and so you have X took the cash register, and then you have another witness who says that Mr. Moldovsky's client took the cas[h] register, the jury will assume X is Mr. Moldovsky's client, and, therefore, isn't that letting the evidence through the back door?

MS. RUIZ: Judge, as I read it, you could also say the other – for example, in Atil Finney's statement where he says three guys go in, three people go in. Why not say, "I went in and the other guys went in, and one of the other guys took the cash register."[?]

THE COURT: Mr. Moldovsky would argue is, that even if you say that, and then you have one [26] witness who is naming someone who took the cash register, the jury will assume the unnamed other guy is the person being named by the outside witness.

Therefore that pinpoints his client, and it lets the jury add up who X is and brings in evidence that isn't admissible, because, in effect, it is just like identifying X in the co-defendant's statement.

Now, there are cases that say that. I'm very much aware of the fact there are cases that don't say that you have to sever just because the jury might be able to figure out who is being identified when you say the other guy, or X, or whoever it is you say.

MS. RUIZ: Judge, I think you could probabl[y] argue that in almost any case where they still allow

redacted statements to come in if there isn't a violation of –

THE COURT: – It is discretionary, and it is a question of fairness, and I always look at what is fair, and I don't always look at what you're allowed to do or what you should do, but there are a lot of cases that say you can do it, and you won't be reversed for doing it, but on the other [27] hand, if you have discretion about what you should do rather than whether you can do it, but it's not a fair result, so I have to look a[t] what's fair, and I will have to look at the notes of testimony from the preliminary hearing, which I assume are relevant and read the statements which you're going to hand up.

MS. RUIZ: Yes.

THE COURT: Mr. Medway?

MR. MEDWAY: I just wanted to say one other thing. We're assuming at this juncture, for the purposes of our argument, the Commonwealth is going to read Gregory Womack's statement into evidence.

The thing is, I think when you read his statement against that of Atil Finney, or Julius Jenkins, and the testimony [of] Demond Jackson from the preliminary hearing, I think, perhaps, it becomes clear that Mr. Womack's statement is somewhat of an aberration in terms of what actually occurred. It might even be a fabrication of what actually occurred, and the Commonwealth could conceivably, when we get to trial, assuming we're all together, could decide at that point that we are not going to read Mr. Womack's statement, and then you go [28] back to the original problem, by letting in through the back door what you can't let in the front door with the jury making the

deduction about X or Y or Z, or whatever ever [sic] letters or phrases are used.

THE COURT: Clearly, it would be Mr. Moldovsky's client who would be in jeopardy then and not yours, because the only identification of the actual person would be Mr. Moldovsky's client.

MS. RUIZ: You mean in the statement.

THE COURT: In the hypothetical posed by Mr. Moldovsky, where you don't introduce Mr. Womack's statement, but you only use one statement, and the statement says X takes the cash register, and a witness later says X was Mr. Moldovsky's client.

He's in jeopardy, but nobody else is. But that doesn't necessarily mean the case has to be severed.

MS. RUIZ: Well, Judge, there's all of the argument, as the Court can make, in terms of redaction, saying three went in and three came out, and then we divided the money up, and then there's no identification as to who was carrying the cash register.

THE COURT: You may choose to propose that [29] kind of redaction where none of the statements about the cash register are read to the jury.

MS. RUIZ: Right. Or it's redacted in such a way that –

THE COURT: Because you don't really care, do you?

MS. RUIZ: No, I don't. It can just be read out that not one specific person carries out the cash register.

THE COURT: In other words, there's no crime here: carrying a cash register.

MS. RUIZ: That's right.

THE COURT: You're just interested in who went in –

MS. RUIZ: – and who went out, and who shared in the proceeds, and I think that kind of redaction could take care of any prejudice to Mr. Moldovsky's client and any other of the co-defendants.

THE COURT: Do you agree, Counsel?

MR. MOLDOVSKY: If we're solely addressing the second argument that I'm making, yes.

THE COURT: So it seems the real issue here is whether or not they have to be severed because of the death penalty against Mr. Ibrahim's client. [30]

MS. RUIZ: Right, and my only argument is, Your Honor, and I have not found any cases and I have myself tried a case where there was a death qualified jury and they found death on one and third on the other; and furthermore the jury in this case is going to be [t]old it's second degree as to [the] rest of the co-defendants and only first degree as to the one, and I think the court could make it fairly clear to the jury with respect to what they need to do with Mr. Jenkin's client (sic) and what they need to do with the other co-defendants.

I don't think there is a likelihood they are going to convict just because they are death qualified, and I don't know of any case, and, as a matter of fact, where they convict –

THE COURT: The case law is the opposite. The case law is that there has never been a judicial finding at the appellate level that a death qualified jury is

more prone to convict, and, therefore, the findings of case law is exactly the opposite.

MS. RUIZ: Judge, at this point, then, if there is no opposition by Counsel, I will give you a copy of all three statements, Your Honor, and it [31] is my intention at this time not to use Mr. Jenkins' statement, but here's a copy of Mr. Womack [sic], Mr. Finney's, and Mr. Jenkins' statements.

MR. MOLDOVSKY: No objection. My only request is that whatever order Your Honor fashions, you can certainly take into account the equivocal language used by the DA, that "at this time I have no intention," so that your order could be that if she doesn't use it –

THE COURT: No, no, no. I would make an order that they would have to be redacted that way. If I were ruling on severance, that would be par[t] of the reason for my ruling, that they should be severed.

We will have a hard copy of this hearing made today in all the cases.

What is the status otherwise, Mr. Medway?

MR. MEDWAY: In terms of preparation for trial?

THE COURT: Yes.

MR. MEDWAY: We are approaching readiness. We are certainly approaching readiness.

THE COURT: Do you think that because – well, we better not make it a ready pool at next listing. [32]

MR. MEDWAY: I think by the next status listing I will definitely be prepared to tell the Court that we're ready.

THE COURT: Very well.

We will continue all these matters to the date we gave before, which is 10/2/95.

MR. SIEGEL: Your Honor, if I may, on behalf of Atil Finney, I understand that the Court and Mr. Moldovsky have the notes of testimony.

Also, it's my understanding neither the Commonwealth nor Mr. Medway, nor Mr. Rudenstein, and I know myself, have ever seen a copy of the notes of testimony, although we've asked.

THE COURT: I would be happy to make them available to anyone on a short term basis to copy them, if you will return them to me.

MR. SIEGEL: Fine. My point is that I indicated the last time that based upon receipt of those notes of testimony that I intend to file a Motion to Quash two of the counts.

I haven't received them yet, and I haven't filed that motion yet. I still would intend to, not the homicide count, but the two additional robbery charges.

THE COURT: Well, they must be available at [33] the copy center, if I have them.

MR. SIEGEL: They aren't at the copy center.

THE COURT Although mine look like a Xerox copy.

MR. MOLDOVSKY: 34 South 11th, the fifth floor. They are all there.

MR. SIEGEL: I contacted them and received no response.

MR. MOLDVOSKY: They may not call back, but when he put mine in, he put the rest in.

MS. RUIZ: I haven't gotten my copy either. The only thing is it may be i[n] my office.

THE COURT: Very well, then, if you file such a motion, we will hear it at the next listing.

MR. SIEGEL: Thank you, Your Honor.

THE COURT: Thank you, Counsel.

MS. RUIZ: Judge, is it my understand[ing] that the Court will hold this severance motion under advisement until 10/2/95?

THE COURT: Yes, we will note motion to sever held under advisement and we will continue until 10/2, and it's excludable time.

THE COURT: Next matter, please.

* * * * *

IN SUPERIOR COURT OF PENNSYLVANIA
PHILADELPHIA DISTRICT

COPY
PENNSYLVANIA
SUPERIOR COURT
APR 25 1997
PHILA. DISTRICT

COMMONWEALTH
OF PENNSYLVANIA,

vs.

NO. 01829
PHILADELPHIA, 1996

JARMAINE Q. TRICE,

Appellant.

BRIEF FOR APPELLANT

APPEAL FROM THE MAY 13, 1996 JUDGMENTS OF SENTENCE OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, AT NO. 0118, JUNE TERM, 1995, CHARGING SECOND DEGREE MURDER AND RELATED OFFENSES.

APR 28 1997
APPEALS UNIT

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* * * * * *

[2] STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

The scope of review is the record from the Court of Common Pleas. However, the trial notes of testimony from February 29, and March 4, 1996, have been lost by the retired court reporter. All efforts to obtain these volumes of testimony diligently have been made by your brief writer in conjunction with the aid of the trial judge, the Honorable John J. Poserina, Jr., and his staff. *See* Appendix "B." Commonwealth witness, Demond Jackson, testified to the judge and jury on February 29, and March 4, 1996. His was the only testimony to inculpate appellant at trial. Because these notes have been lost, your brief writer, making reference to his personal trial notes of testimony of Demond Jackson, will proceed according to Pa.R.A.P. 1923.

The standard for review of the errors raised herein was articulated by our Supreme Court in *Commonwealth v. Bond*, 539 Pa. 299, 312, 652 A.2d 308, 314 (1995), which is a harmless error analysis, as set forth in *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978), and *Commonwealth v. Chestnut*, 511 Pa. 169, 512 A.2d 603 (1986)(violation of a defendant's right to confrontation occurring through the admission of a codefendant's redacted confession is subjected to harmless error analysis).

The standard of review of prosecutorial misconduct issues is *de novo* review. It is the burden of the Commonwealth to establish that its misconduct did not affect the outcome of the trial. *Commonwealth v. Bricker*, 506 Pa. 571, 589-91, 487 A.2d 346, 355 (1985).

Our Supreme Court has ruled that an error is harmless "only when in light of the overwhelming evidence of guilt it was so insignificant that it could not have contributed to the verdict." *Bond*, 539 Pa. at 313, 652 A.2d at 314. [3]

ORDER IN QUESTION

The Order which is the subject of this Appeal is the Judgment of Sentence issued on May 13, 1996, by the Honorable John J. Poserina, Jr., Judge of the Court of Common Pleas for the First Judicial District of Pennsylvania. Judgments were issued on counts in Bill 118, June Term, 1995, subsequent to a jury verdict of guilty on five counts in said Bill. [4]

STATEMENT OF THE QUESTIONS INVOLVED

I. Is meaningful appellate review possible herein where the trial notes of testimony of the most questionable of witnesses, and the only one who inculpated appellant, have been lost?

(Not answered by the lower court.)

II. In light of the police and prosecutorial misconduct herein, polluting the redaction of the co-defendants' statements, along with the fact that a co-defendant was subject to the death penalty, although appellant was not, should a severance have been granted?

(Answered in the negative by the lower court.)

III. Under all of the circumstances of this case, was it error for the trial judge to admit evidence of a separate attempted robbery, which he had ruled was not a signature crime?

(Answered in the negative by the lower court.) [5]

STATEMENT OF THE CASE

Procedural History

Appellant, Jarmaine Q. Trice, was charged in June Term 1995, Bill No. 118, counts one to twenty, with second degree murder, robbery, conspiracy and related offenses. The charges arose out of an incident that occurred on December 11, 1993, during which Lilly's Market, located at 3122 West York Street in Philadelphia, Pennsylvania, was robbed and Francisco Azcona was fatally shot.

On July 25, 1995, a motion pursuant to Pennsylvania Rule of Criminal Procedure 1128 was filed seeking severance of appellant's trial from his co-defendants. The Homicide Calendar Judge, the Honorable Carolyn Engel Temin, held hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion. However, she redacted the co-defendants' statements for trial and ruled that the trial judge should resolve any further problem. The motion was renewed during jury selection on February 12, 13, and 14, 1996 (which have not yet been finished, see Appendix "B"), as well as during trial on March 5, 1996 (N.T. 3/5/96 81-2).

Appellant entered pleas of not guilty on the charges and proceeded to trial by jury, along with four co-defendants. One of the co-defendants, Julius Jenkins, was charged with first degree murder and subject to the death penalty. This left your appellant subject to trial by a death qualified jury, where twenty-three potential jurors were lost solely because they could not return a verdict of death although they

could vote for a life sentence. Jury selection was completed on February 22, 1996. On that date the last six of the said twenty-three prospective jurors were lost to the prosecutor's challenges for cause because they [6] could not return a death penalty. (N.T. 2/22/96 41.) On March 13, 1996, the jury found appellant guilty of murder in the second degree, three counts of robbery, and conspiracy.

Sentencing took place on May 13, 1996, and appellant was sentenced to life for the second degree murder conviction, consecutive five to ten years imprisonment for the robbery of Anna Azcona, and no further penalty was imposed on the two remaining counts of robbery, nor on the conspiracy bill. Notice of appeal then was filed in a timely manner on May 22, 1996, followed by a Statement Of Matters Complained Of On Appeal on 11 June 7, 1996.

As noted *supra*, page 2, the notes of testimony from February 29 and March 4, 1996 are lost. *See* Appendix "B." The testimony of Commonwealth witness, Demond Jackson, was given to the judge and jury on February 29 and March 4, 1996. His was the only testimony to inculpate appellant at trial. Because these notes are missing, there is no evidence of record at all to sustain appellant's conviction. Appellant could not have raised this issue at the time the Statement Of Matters Complained Of On Appeal was filed, on June 7, 1996, because no notes of testimony had been transcribed yet.

Appellant respectfully requests that a new trial be granted in this matter, since not to do so would violate his right to due process and offend the concepts of fundamental fairness and equal protection guaranteed

in both the Pennsylvania and Federal Constitutions. Appellant has no record of the said trial testimony to cite and contest before Your Honorable Court, and any attempted reconstruction would be incomplete. It would not be the full and accurate record that upon which the *jury* based its decision. This testimony is crucial to appellant, since his conviction had to have been based completely on [7] the testimony of Demond Jackson given on those two dates. The defense thoroughly impeached him. *See* Argument I, *infra*. Additionally, the prosecutor's and detective's impermissible efforts to buttress this most suspect of witnesses is detailed *infra*. *See* Argument II, A, B, C, and D.

Factual History

The facts of the case as found by the trial court and delineated in its Opinion (Appendix "A" 1-4) are summarized here. On Saturday, December 11, 1993, appellant, along with four other males, agreed to "get paid," *i.e.*, to rob Lilly's Market at 3122 W. York Street in Philadelphia, Pennsylvania. Demond Jackson was with appellant and the codefendants, but declined to enter into the conspiracy. He asked for a ride to "West Philly." He later testified against appellant and the co-defendants. All six males were in codefendant Gregory Womack's 1979 Oldsmobile Cutlass Cruiser, a four-door silver color station wagon.

In a series of rapid events, three males, Atil Finney, Julius Jenkins and Jarmaine Trice, appellant herein, entered the store. Three remained in the car. Jenkins and appellant went to the counter with the cash register where Anna Azcona and Andrea Rodriguez were. However, appellant was not identified

by any witness in the store. The decedent, Francisco Azcona, was also behind the counter, but he was stocking shelves and was not immediately visible from the counter. Jenkins announced a hold-up and demanded cash. The decedent stood up and was shot and killed by Jenkins. Ballistic evidence demonstrated that the decedent was killed with a .44 caliber bullet shot from a .45 revolver. [8] The witnesses, Anna Azcona and Andrea Rodriguez, identified Jenkins as the person who shot the decedent. Appellant grabbed the cash register and all three individuals left the store and returned to the automobile.

Three days after the homicide, in a separate incident occurring in the vicinity of the Ace Check Cashing store located at 29th and York, appellant and three co-defendants were arrested. Near the location where they were arrested, a .45 caliber hand gun was recovered. Although the trial court ruled that the separate robbery at Ace Check Cashing was inadmissible as a signature crime, the testimony surrounding the recovery of the weapon in the presence of these same individuals was allowed to establish that these males knew each other, used the same car, and had access to a gun. Police Officer Mitchell McKeever observed the males at Ace Check Cashing and attempted to stop the car. Other police, who arrived later, recovered at .45 caliber revolver near the location. Ballistics made a comparison of the bullet recovered from the body of the deceased with the gun recovered near Ace Check Cashing and determined that it was used to shoot the deceased, Francisco Azcona.

From this summary of the facts found by the trial judge, it is clear that he rejected the trial testimony of

Demond Jackson that four males left the car and committed this crime (lost notes of testimony 2-29-96). In fact, in Jackson's original statement to the police on February 27, 1995, marked as Defense Exhibit 7 on February 29, 1996, on page two, he had stated that appellant, whom he knew as "Quad," remained in the car along with him and the driver and only three males exited the car; he said that co-defendant Naree Abdullah, known to him as "Naim," carried the cash register around the corner from the store to [9] where the car was parked. At page 4 of the said statement he identified "Naim's" photo, which was co-defendant Naree Abdullah. At page 5 he identified "Quad's" photo as Quhir Wise which is an alias of Jarmaine Q. Trice, appellant, whose Philadelphia Photo Number is 715289, as noted in the said statement. Appellant is also known as Eric Greene. At ten different places throughout the entire statement he refers to "Quad" and "Naim" and is consistent that "Quad" remained in the car, and that "Naim" returned with the cash register.

Interestingly, the trial judge disbelieved this witness when he changed his story at trial and said that four men got out of the car and went to the store, because the judge has found that only three had gone to the store. Yet, the trial judge accepted the new story that appellant went into the store and returned with the cash register, instead of Jackson's original version in his statement that "Quad" (appellant) never left the car and only three people went to the store. This is amazing because on March 4, 1996 (lost notes of testimony), Jackson testified that the police corrected the mistakes he had made in his statement. He also admitted that he had three pending drug cases, to be

prosecuted by the same District Attorney's office as herein, at the time of his first statement about this case. He testified that the police had put these drugs on him. He even admitted that he had lied at a pretrial hearing in order to look good.

He also acknowledged that he knew that he could be charged with this murder, as well as another attempted robbery in which he was shot in the hand. In Defense Exhibit 8, a police report of December 30, 1993, also introduced on February 29, 1996, Jackson had reported that on December 11, 1993, he had been shot in the hand by robbers who demanded his coat in the 7700 block of Ogontz Avenue, in Philadelphia. He gave specific [10] details about the physical and clothing descriptions of the robbers. At trial, he admitted that the whole story was a fake and that he also had lied to the people at the hospital that night. In Defense Exhibit 7, pages 1 and 3, he related a completely different story. He said that he had gotten shot in the hand at a bar in North Philadelphia at 22nd and Diamond Streets during a robbery that some of his companions committed.

In co-defendant Finney's confession, Commonwealth Exhibit 29, pages 2 and 3 (introduced on March 5, 1996, N.T. 111 and 117), Finney states that he and two others went into the store. On page 7 of his statement he said that he knew everyone in the car and that he did not know Demond Jackson. (N.T. 3/5/96 120.) According to this, Demond Jackson was not in the car at all.

Co-defendant Womack's confession was introduced on March 6, 1996, as Commonwealth Exhibit 32. (N.T.

3/6/96 32 and 38.) He also said that only three people entered the store.

This major contradiction between Demond Jackson's trial testimony that there were four robbers, and the co-defendants' confessions that there were only three, was resolved by the trial judge against Jackson. Jackson had every reason to curry favor with the police, as outlined herein, and would parrot whatever he thought they wanted to hear whenever they wanted it, whether in a statement or in testimony. This most suspect of witnesses was buttressed impermissibly by the misconduct of the prosecutor and police at trial as explained in Argument II, *infra*.

Your brief writer has gone into this great detail to illustrate that without the missing trial notes of testimony, appellate review cannot be full and fair. Jackson was the most [11] corrupt and tainted of witnesses. He was a self-admitted liar. If he did not do exactly as he thought the police wanted, he could at any time be charged with the instant murder. Even whether or not he actually was in the said car during the robbery is not clear. Without his lost testimony not one word in the record supports appellant's conviction. If the facts found by the trial judge are examined in detail, one must conclude that the judge did not believe Jackson about substantial parts of his testimony. Therefore, the facts are so muddled, contradictory and unreliable that Your Honorable Court must grant a new trial in order to give justice another chance to prevail. Under any analysis, there was nothing like overwhelming evidence of appellant's guilt!

[12]

SUMMARY OF ARGUMENT

The record before your Honorable Court does not contain one word incriminating appellant. That is because the notes of testimony of the only witness, Demond Jackson, who implicated him have been lost. This was not known until April, 1997, after a year of being assured that such notes would be forthcoming. Though the trial judge and the District Attorney's office were notified of this at once by your brief writer, and an attempt to reconstruct this testimony will be made herein, meaningful appellate review is not possible.

This witness had three open drug cases to be prosecuted by the same District Attorney's office as the instant case. He gave contradictory statements on many matters. He admitted to lying about many matters. He also acknowledged that he knew that he could be charged with the instant murder and another attempted robbery in which he was shot in the hand. He testified that the police put the drugs on him in his case, and that the detectives corrected the mistakes he made in his statement about the instant case.

Without the actual trial notes of testimony revealing the depravity, corruption, incredibility and motivation of this witness, appellate review cannot be fun and fair. The various standards of review allow some trial errors to be deemed insignificant where there is overwhelming evidence of guilt. Herein, such is not the case. Not at all.

Pretrial severance should have been granted. It also should have been granted when raised anew at and during trial. Appellant should not have been

forced to trial with a codefendant who faced the death penalty when appellant did not. Twenty-three prospective jurors were excused for cause after they said that they could not impose the death penalty, [13] though they could impose a life sentence. To that extent, appellant was denied a fair trial by his peers, who included people against the death penalty.

None of the five co-defendants testified in this case. The redacted confessions of two of them were read to the jury. In her summation, the prosecutor destroyed the purpose of said redactions by gesturing toward all the co-defendants and arguing that the said confessions proved that all of them committed this crime together.

This also made the defenses antagonistic. Severance should have been granted by the trial judge for this reason. Appellant relied on his presumption of innocence. His defense was to plead not guilty, and require the Commonwealth properly to prove his guilt. The redacted statements did not implicate him, but when the prosecutor argued in her closing as described, she in effect turned the confessions of the co-defendants into "testimony" against him. If this "testimony" were believed, it would be highly antagonistic to his plea of not guilty and most prejudicial against him.

Unresponsively to the questions asked by co-counsel, the assigned homicide detective herein twice told the jury that the only witness, Demond Jackson, who incriminated appellant, was truthful. Mistrial should have been granted because curative instructions did not suffice in this or the other matters complained of herein.

Though the trial judge had ruled that the details of a separate attempted robbery could not be admitted because it was not a signature crime, he did allow the prosecutor to show that four of the five co-defendants had been together in a similar vehicle in that neighborhood a few days later and that one of them had a gun. He directed the prosecutor to instruct Officer Mitchell McKeever not to refer to the incident as a robbery or an [14] attempted robbery, not to mention that there was an arrest, never mind a conviction, and to give no other than the said information about that occurrence.

Though the prosecutor reported to the trial judge that she confirmed all of this with the said officer, he nonetheless went on to testify that a co-defendant had pointed a gun at him and pulled the trigger, which in fact made out the crime of attempted murder. The prosecutor also violated the judge's limiting instructions when she asked Officer Mitchell McKeever if he had arrested a co-defendant in this separate attempted robbery. He said that he did. This clear pattern of prosecutorial misconduct certainly contributed to the verdict and is not harmless error.

A mistrial and severance should have been granted after these severely prejudicial violations of the judge's specific instructions. Since it was the capital co-defendant who allegedly had the gun and committed said act, had severance been granted, this would not have been disclosed, since it was elicited during his counsel's cross-examination. Your brief writer would not have asked the questions about the circumstances of that co-defendant and his gun. There was no overwhelming evidence of guilt of appellant herein. Neither living victim nor any witness, except

Demond Jackson, identified him, and appellant had given no confession. If not polluted by the prosecutor's improper summation, the redacted confessions of the co-defendants would not have implicated him. Had the homicide detective not twice testified that Demond Jackson was truthful, his contradictory, highly suspect testimony, which has been lost, could not have convinced twelve reasonable jurors that he was doing anything other than currying favor with the police and prosecution to [15] avoid being charged in this and another crime, as well as helping himself in his three open criminal cases. Without the said police and prosecutorial misconduct, the jurors would not have been inflamed against appellant, because his co-defendant on another occasion had pointed a gun at an officer and pulled the trigger. In light of the weakest evidence of guilt, the assigned errors were so significant that they must have contributed to the verdict herein and were not harmless. Therefore, a new trial must be granted to afford appellant Due Process[1] and Equal Protection[2] of the law. [16]

ARGUMENT

I. Fundamental Fairness, Guaranteed in the United States and Pennsylvania Constitution, Requires That Appellant Be Afforded a New Trial Because No Evidence on the Record Before Your Honorable Court Inculpates Him, the Trial Notes of Testimony of the Only Witness Who Implicated Him Having Been Lost, and Meaningful Appellate

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[1] U.S. Const. 5th and 14th Amendments; Pa. Const., Art. I § 9.

[2] U.S. Const. 5th and 14th Amendments; Pa. Const., Art. I §§ 1, 26, and 28.

Review of this Most Questionable of Witnesses Is Not Possible Under the Circumstances of this Case.

The notes of testimony from February 29 and March 5, 1996, were not produced. Exhaustive efforts to obtain these volumes of testimony were diligently made by your brief writer in conjunction with the trial judge, the Honorable John J. Poserina, Jr., and his staff. These notes of testimony have been lost. *See* Appendix "B." Appellant could not have raised this issue at the time the Statement Of Matters Complained Of On Appeal was filed, on June 7, 1996, because the notes of testimony had not been transcribed yet. He could not raise nor waive an issue that did not yet exist. Appellant respectfully requests that a new trial be granted in this matter, since it would violate his right to due process, equal protection of the law, and thus offend the concept of fundamental fairness, as guaranteed by both the Pennsylvania and Federal Constitutions. Appellant has no record of the testimony Demond Jackson gave to the judge and jury to cite and contest before Your Honorable Court. Nor can this testimony meaningfully be reconstructed. *See* this Argument, *infra*.

The standard for reviewing claims challenging the sufficiency of the evidence recently has been reiterated by our Supreme Court in *Commonwealth v. Biagini*. 655 A.2d 492, 497, 540 Pa. 22, 31 (1995), as follows:

> The time honored standard for reviewing a claim of insufficiency of the evidence was well stated in *Commonwealth v. Burton*, 450 Pa. 532, 534, 301 A.2d 599, 600 (1973):

> [17] As we have repeatedly said the test in determining if the evidence is sufficient to sustain a criminal conviction is, whether accepting as true all of the evidence of the Commonwealth, and all reasonable inferences arising therefrom, upon which the jury could properly have reached its verdict, was it sufficient in law to prove beyond a reasonable doubt that the appellant was guilty of the crime of which he stands convicted.

When reviewing a claim challenging the sufficiency of the evidence, the Appellate Court must examine all of the evidence at trial, as well as all reasonable inferences to be drawn therefrom, in the light most favorable to the Commonwealth. *Commonwealth v. Carson*, 592 A.2d 1318, 1319 (Pa. Super. 1991). Furthermore, both direct and circumstantial evidence must be considered equally when assessing the sufficiency of the evidence. *Id.* The test for evaluating the sufficiency of the evidence is, whether or not, viewing the evidence in the light most favorable to the Commonwealth, and drawing all reasonable inferences therefrom favorable to the Commonwealth, there is sufficient evidence to enable the trier of fact to find every element of the crime beyond a reasonable doubt. *Commonwealth v. Lyons*, 390 Pa. Super. 464, 470, 568 A.2d 1266, 1269 (1989); *Commonwealth v. Stoyko*, 504 Pa. 455, 475 A.2d 714 (1984); *Commonwealth v. Leatherbury*, 322 Pa. Super. 129, 469 A.2d 263 (1983).

Herein, Commonwealth witness, Mrs. Azcona, did not identify appellant as one of the robbers, though she did identify co-defendant Jenkins. (*See* N.T. 2/24/96 pgs. 13-14). The second Commonwealth

witness, Ms. Andrea Rodriguez, also did not identify appellant. (*See* N.T. 2/27/96 pgs. 71-72). The only testimony, which was highly questionable, specifically implicating appellant was the testimony of Demond Jackson. This testimony being absent, the record as it stands does not contain sufficient evidence to support appellant's convictions. Therefore, this conviction can not stand. Your Honorable Court [18] may grant a new trial instead of arresting judgment. Any reconstruction under Pennsylvania Rule of Appellate Procedure 1123 would not be the complete and accurate version upon which the jury based its opinion and, therefore, no meaningful appellate review would be possible under all of the circumstances herein, as detailed in the Statement of the Case, *supra*.

II. Appellant Should Have His Trial Severed From the Co-Defendants Not Just Because of Their Antagonistic Defenses, Nor Just Because He Was Forced to Trial with a Co-Defendant Subject to the Death Penalty, Though Appellant Was Not, But Particularly Because Effective Redaction of the Co-Defendants' Statements, Though Attempted, Was Polluted By the Gross Prosecutorial and Police Misconduct Herein.

On July 25, 1995, a motion was filed seeking severance of appellant's trial from those of his co-defendants. Hearings were held before the Honorable Carolyn Engel Temin, including hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion, but said that any further problem should be resolved by the trial judge. The motion was renewed during jury selection on February

12, 13, and 14, 1996,[3] as well as during the trial on March 5, 1996 (N.T. 3/5/96 81-2).

The learned trial judge, notwithstanding his good intentions, denied appellant his right to Due Process[4] and Equal Protection[5] of the law under the Federal and State Constitutions. He was subject to trial along with one of the co-defendants, Julius Jenkins, [19] charged with a capital crime, and forced to face a jury which has been death qualified and knew that it would be asked to return a death penalty for Jenkins.

The decision whether or not to sever cases against co-defendants is one within the sound discretion of the trial court.[6] Such a decision will be reversed only where there has been a manifest abuse of that discretion. *Commonwealth v. Lasch*, 464 Pa. 573, 347 A.2d 690 (1975). The critical factor is the prejudice which inures to the accused as a result of the trial court's determination. *Commonwealth v. Peterson*, 453 Pa. 187, 307 A.2d 264 (1973); *Lasch, supra.*

In the instant case, the court's denial of appellant's Motion to Sever was an abuse of discretion that caused severe and substantial prejudice to appellant. *See Commonwealth v. Katsafans*, 464 A.2d 1270 (Pa.

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[3] *See* Appendix "B." The notes of testimony from February 12 through 14, 1996, have not been provided to your brief writer as of the date of this writing.

[4] U.S. Const., 5th and 4th Amendments; Pa. Const., Art. I § 9.

[5] U.S. Const., 5th and 14th Amendments; Pa. Const., Art. I §§ 1, 26, and 28.

[6] *Commonwealth v. Kloiber*, 378 Pa. 412, 106 A.2d 820 (1954), *cert denied*, 348 U.S. 875 (1954); *Commonwealth v. Granberry*, 346 Pa. Super. 395, 499 A.2d 671 (1985).

Super. 1983); *Commonwealth v. Dumas*, 445 A.2d 782 (Pa. Super. 1982). Twenty-three potential jurors were lost to appellant solely because they could not return a verdict of death, although they could return a verdict of life imprisonment. On February 12 through 14, 1996, respectively, 9, 5, and 3 prospective jurors were lost.[7] On each of these dates the motion for severance was renewed and denied. The final six were lost on February 22, 1996. (N.T. 2/22/96 41.) It should be noted that these twenty-three prospective jurors were lost solely for this reason. No challenge is made herein to the loss [20] of any other potential juror.

This violated appellant's right to a jury of his peers as required by the Sixth Amendment to the United States Constitution and Article I, §9 of the Pennsylvania Constitution. Appellant's peers are made up of people both for and against the death penalty. Together, they represent a cross-section of appellant's community. This loss of the said twenty-three prospective jurors also violated appellant's Due Process[8] and Equal Protection[9] rights. Many needed additional peremptory challenges could have been given here to attempt to diminish this prejudice to appellant. Though requested, this was not done. Herein, appellant and each of the non-capital co-

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[7] Although the notes of testimony from the days of jury selection apparently have been recovered, the only volume produced as of the date of this writing is from February 22, 1996. The notes from jury selection on February 12-14, 1996, still have not been made available. *See* Appendix "B."

[8] U.S. Const., 5th and 14th Amendments; Pa. Const., Art. I § 9.

[9] U.S. Const., 5th and 14th Amendments; Pa. Cost., Art. I §§ 1, 26, and 28.

defendants each got two preemptory challenges. Your brief writer, after argument, was given two more, for a total of four. All four were exhausted by him and no additional ones were allowed.

The learned trial judge, in his Opinion (Appendix "A" 5-7), dwells on the courts having held that a death qualified jury is not conviction prone. Appellant is not happy with this state of the law, and objected to it. However, appellant additionally argues that he is entitled to a jury of his peers including those against the death penalty, but who could vote for life imprisonment. Since this is not a capital proceeding as far as appellant is concerned, he should not have been joined in a trial where the Commonwealth could challenge for cause those who could not vote for a sentence of death. There was no consideration of the death penalty for appellant and, therefore, the prosecutor's challenge for cause of those prospective jurors against the death penalty, as this related to appellant, constituted a [21] violation of appellant's rights to Due Process[10] and Equal Protection[11] of the law. Therefore, the Opinion of the lower court is inapropos. Accordingly, severance should have been granted and appellant should not have been tried with the capital co-defendant. Appellant humbly submits that separate trials were required to protect his constitutional rights. Therefore, a new trial should be granted, wherein appellant would not be tried along

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[10] U.S. Const., 5th and 14th Amendments; Pa. Const., Art. I § 9.

[11] U.S. Const., 5th and 14th Amendments; Pa. Const., Art. I § 9.

with the capital co-defendant, because jury selection for one is different from the other.

In *Bruton v. United States*, 391 U.S. 123 (1968), The United States Supreme Court held that the introduction into evidence at a joint trial of the out-of-court statement of a co-defendant, who is not subject to cross-examination, is a denial of a appellant's Sixth Amendment right to confrontation.

In *Commonwealth v. Bosman*, 213 Pa. Super. 258, 247 A.2d 647 (1968), the Commonwealth sought to avoid the application of *Bruton* by arguing that the co-defendant's statement was not prejudicial to Bosman since it did not implicate him. Although the statement did not place Bosman at the scene of the robbery, the Court rejected the Commonwealth's argument, and held that the co-defendant's statement impliedly implicated the appellant in the robbery. The Court stated (*id.*, at 648):

> These references to appellant's involvement in the robbery and post-robbery activity are incriminating, not exculpatory, and bring the statement within the ambit of *Bruton*.

Pursuant to *Bruton*, appellant's trial should have been severed from the trial of the co-defendants. The statements made by the co-defendants, which implicate appellant, were [22] used by the Commonwealth in a joint trial to the irrevocable prejudice of appellant. It was alleged, in suppression motions, that the statements obtained by the police from the codefendants were involuntary and, therefore, unlawful. The evidence offered against the codefendants, none of whom testified, was inconsistent, harmful and prejudicial to appellant, who

did not confess, pled not guilty, and did not testify. As detailed *infra*, in Argument II D, the prosecutor unlawfully turned their confessions into constructive "testimony" by them against appellant.

The alleged statements given by the co-defendants were not suitable for redaction. The attempted redaction by the Honorable Carolyn Engel Temin served only to prejudice appellant. Joinder herein confused the issues, irreparably prejudiced appellant, and constituted a denial of fundamental due process, as guaranteed by both the Pennsylvania and Federal Constitutions, *supra*. Though Judge Temin and the learned trial judge attempted redaction, their best efforts were frustrated by the impermissible prosecution tactics.

The Federal Supreme Court has addressed the application of *Bruton*. In *Cruz v. New York*, 55 U.S.L.W. 4515 (1987), the Court held that where a non-testifying co-defendant's confession, facially incriminating the defendant, is not directly admissible against the defendant, the Sixth Amendment Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him. The *Cruz* Court expressly overruled *Parker v. Randolph*, 442 U.S. 62 (1979), stating that the assumption that an "interlocking" confession precludes devastation (to the defendant) is rendered untenable by the infinite [23] variability of inculpatory statements.

In the case before this Honorable Court, the statements of the co-defendants are inextricably interlocked. The appellant gave no statement. This

case is indistinguishable from both *Bruton* and *Cruz* with respect to those factors that the Court has deemed relevant in this area. They are the likelihood that jury instructions will be disregarded, the probability that such disregard will have a devastating effect, and the determinability of these facts in advance of trial. *Cruz, supra.* Herein, these factors were all realized. The jury instructions apparently were disregarded in light of the most contradictory testimony of the most suspicious of witnesses, Demond Jackson, who gave the sole testimony implicating appellant. Thus, the probability of such disregard was realized and had a devastating effect. The determinability of these factors in advance of trial was foreseen by your brief writer and argued repeatedly in the lower court.[12]

In *Richardson v. Marsh*, 55 U.S.L.W. 4509 (1987), the Supreme Court held that the Confrontation Clause is not violated by the admission of a non-testifying co-defendant's confession with a proper limiting instruction, when the confession is redacted to eliminate not only the defendant's name, but any reference to the defendant's existence. It was argued below both that such redaction would destroy the narrative integrity of the statements, and prejudice appellant in the case at bar. The appellant did suffer

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[12] On July 25, 1995, a motion was filed seeking severance of appellant's trial from those of his co-defendants. Hearings were held before the Honorable Carolyn Engel Temin, including hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion, but left future problems to be resolved by the trial judge. The motion was renewed during jury selection on February 12, 13, and 14, 1996, as well as during trial on March 5, 1996 (N.T. 3/5/96 p.81-2).

such [24] prejudice at trial. Our Pennsylvania Supreme Court has previously determined that if a statement retains its narrative integrity and yet in no way refers to the defendant, then the use of it does not violate the principles of *Bruton*. The practical application of the theory may be difficult and in many cases it may be decided that separate trials are necessary. Herein, the statements of the co-defendants were interlocking and the prosecutor's unlawful tactics, as detailed *infra*, in Argument II D, used them against appellant. Separate trials should have been ordered to avoid the irreparable prejudice caused to appellant by being forced to trial with co-defendants whose statements were introduced, but who did not testify. *Commonwealth v. Johnson*[13] requires that this determination be made on a case by case basis. In this case only severance would have served justice.

Where redaction is impossible or would prejudice the defendant, the court either must grant a defense motion to sever or forbid any use of the confessions. *Commonwealth ex rel. Berkery v. Myers*, 429 Pa. 378, n. 4, 239 A.2d 805, n. 4 (1968). After all, it is the Commonwealth which sought the joint trial. Either of these options would have been sufficient herein, but neither was ordered by the lower court, resulting in substantial and irreparable harm to appellant. Accordingly, it was an abuse of discretion that severance was not granted herein and appellant should have been tried separately to afford him his state and federal constitutional rights.

A. Officer Mitchell McKeever Violated the Judge's

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[13] 474 Pa. 410, 412, 378 A.2d 859, 860 (1977).

Instruction Limiting His Testimony About a Separate Attempted Robbery, When He Testified That a Co-Defendant in That Incident Pointed a Gun at Him and Pulled the [25] Trigger

The standard of review on evidentiary issues is whether or not the trial judge abused his discretion. *Commonwealth v. Banks*, 513 A.2d 318, 512 A.2d 1 (1987), *cert. denied* 484 U.S. 873 (1987). In the instant matter, the learned trial judge correctly ruled that the Ace Check Cashing robbery was not a signature crime, but allowed limited evidence in from that event to show acquaintanceship, access to a gun, and similarity of the car. (Appendix "A" 8.) This was done after argument (out of the jury's presence) on a motion in limine brought by your brief writer. (NT. 3/5/96 4-12.) This ruling was erroneous, constituting an abuse of discretion, since the probative value of this evidence was substantially outweighed by its prejudicial effect. However, the trial court took great pains to ensure that his ruling was properly executed by the Assistant District Attorney and her witness, Officer Mitchell McKeever. (N.T. 3/5/96 12 and 20.) Though the prosecutor reported to the trial judge that she confirmed all of this with the said officer, he nonetheless went on to testify that a codefendant had pointed a gun at him and pulled the trigger. *Id.*

Assuming *arguendo*, that admission of this evidence, as circumscribed by the lower court, was proper, the ruling was violated, resulting in substantial irreparable prejudice to appellant as will be demonstrated. This would not have happened had appellant's trial been severed, since testimony regarding the details of the co-defendants' activities at

the other attempted robbery would not have been elicited by their lawyers. However, there was no severance, and Officer McKeever destroyed the integrity of the lower court's ruling when he testified as follows under cross-examination by Mr. Ibrahim, counsel for Jenkins (N.T. 3/5/96 78): [25]

Q. And the next time you saw the gun was when it was five feet away from him, correct?

A. No, when he pointed the gun at me and pulled the trigger and when his hand jerked.

This misconduct and contempt clearly pained the learned trial judge, whose instructions so flagrantly had been violated. Nonetheless, when outside the presence of the jury, your brief writer renewed his motion for severance and also moved for a mistrial, such relief was not granted. (N.T. 3/5/96 82-4.) The trial court was adamant that no evidence of another crime, the attempted robbery, was to come in, yet Officer McKeever's testimony made out the crime of attempted murder or aggravated assault on a police officer. This was clearly a violation of both the letter and the spirit of the trial judge's order.

The decision whether or not to sever cases against co-defendants is one within the discretion of the trial court,[14] and such a decision will be reversed only where there has been a manifest abuse of that discretion.[15] The critical factor is the prejudice which

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[14] *Koliber*, 378 Pa. 412, 106 A.2d 820 (1954), *cert denied*, 348 U.S. 875 (1954); *Commonwealth v. Granberry*, 346 Pa. Super 395, 499 A.2d 671 (1985).

[15] *Commonwealth v. Lasch*, 464 Pa. 573, 347 A.2d 690 (1975).

inures to the accused as a result of the trial court's determination. *Peterson, supra*; *Lasch, supra*. In the instant case, the trial court's denial of appellant's Motion to Sever was a manifest abuse of discretion, which caused severe and substantial prejudice to appellant. *See Commonwealth v. Katsafans*, 464 A.2d 1270 (Pa. Super. 1983); *Commonwealth v. Dumas*, 445 A.2d 782 (Pa. Super. 1982).

[27] Appellant urges that Officer McKeever's response, quoted above, constituted police and prosecutorial misconduct, after the trial judge gave explicit instruction to prevent any such testimony, and twice instructed the Assistant District Attorney to convey these limitations to the officer. (N.T. 3/5/96 12 and 20.) The law is clear that a prosecutor must not convey to the jury either expressly or by reasonable implication any act of prior criminal activity attributable to the defendant *Commonwealth v. Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982). Notwithstanding this rule, the Assistant District Attorney elicited from Commonwealth witness Officer McKeever that an arrest was made in relation to the Ace Check Cashing incident (N.T., 3/5/96 72.) Hence, this incident clearly became a crime, which the trial judge had tried to insulate against so that the jury would not be inflamed against appellant and his co-defendants.

The standard employed to determine whether references to specific misconduct provides grounds for reversal is whether information is conveyed to the jury which would create a reasonable inference of prior criminal activity. *Commonwealth v. Nichols*, 485 Pa. 1, 400 A.2d 1281 (1979). In Nichols, *supra*, then Chief

Justice Egan set forth the law concerning references to prior criminal conduct on the part of the accused:

> In Pennsylvania, the law is clear that if a testimonial reference [absent specific circumstances,] . . . indicates to the jury the accused has been involved in prior criminal activity, reversible error has been committed. *Commonwealth v. Turner*, 454 Pa. 439, 311 A.2d 899, (1973).

485 Pa. at 4, 400 A.2d at 1281-82.

Prejudice results where the testimony conveys to the jury either expressly, or by reasonable implication, the fact of another criminal offense. *Commonwealth v. Riggins*, 478 [28] Pa. 222, 386 A.2d 520 (1978); *Commonwealth v. Banks*, 454 Pa. 401, 311 A.2d 576 (1973). The inference of past criminal conduct is unmistakable here. It was far beyond the evidence which the trial judge intended to allow. In fact, he explicitly had prohibited these details. (N.T. 3/5/96 10-12). The references were clearly improper, causing severe and irreparable prejudice to appellant. This is especially true because the particular activity testified to by Officer McKeever suggests a violent disposition, severely prejudicing appellant in light of the violent nature of the charges against him and his co-defendants.

It is firmly settled that "[a] reference either expressly or by reasonable implication, to prior criminal activity, which does not qualify as a recognized exception to the general rule excluding evidence of an accused's prior criminal conviction . . . is impermissible." *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982) (citing *Commonwealth v. Penn*, 497

Pa. 232, 439 A.2d 1154 (182); *Commonwealth v. Roots*, 482 Pa. 33, 393 A.2d 364 (1978); *Commonwealth v. Terrell*, 234 Pa. Super. 325, 339 A.2d 112 (1975). *Accord, Commonwealth v. Washington*, 488 Pa. 133, 411 A.2d 490 (1979 ("a testimonial reference indicating to the jury that the accused had been engaged in other criminal activity, denies the accused a fair trial. . ."); *Commonwealth v. Spruill*, 480 Pa. 601, 391 A.2d 1048 (1978) ("evidence of prior criminal activity . . . is probably only equalled by a confession in its prejudicial impact upon a jury").

It is a principle of long standing in this Commonwealth that evidence of a distinct crime, except under special circumstances, in inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of the other, and the effect of such evidence is to create prejudice in the jury's mind. [29] *Commonwealth v. Fortune*, 464 Pa. 367, 373, 346 A.2d 783 (1975); *Commonwealth v. Wable*, 382 Pa. 80, 84, 114 A.2d 335, 336 (1955); *Commonwealth v. Morris*, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981); *Commonwealth v. Bryant*, 575 Pa. 473, 530 A.2d 83 (1987).

B. In Violation of the Trial Judge's Instruction to the Prosecutor Not to Elicit Testimony of Another Crime, She Asked Officer Mitchell McKeever If He Had Arrested a Co-Defendant For a Separate Attempted Robbery, Which Is Discussed in Argument IIA.

Prosecutorial misconduct denied appellant a fair trial. The Assistant District Attorney also violated the

lower court's order with her direct questioning of Officer McKeever. During direct examination, she improperly asked Officer McKeever if he had effected an arrest in the Ace Check Cashing incident. (N.T. 3/5/96 72.) This questioning constituted impermissible prosecutorial misconduct. As just discussed, she violated the court's Order. The law is clear that a prosecutor must not convey to the jury either expressly or by reasonable implication any act of prior criminal activity. *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982). Notwithstanding this, the prosecutor elicited from Commonwealth witness Officer McKeever that appellant and three of his co-defendants were involved in the Ace Check Cashing incident which led to an arrest. (N.T. 3/5/96 72.) This corrupted the purpose for which the trial judge had permitted limited testimony and instead prejudiced appellant impermissibly by invoking activities of himself and his codefendants which constitutes another crime.

The standard to determine whether or not references to specific misconduct provides grounds for reversal is whether information is conveyed to the jury which would create a [30] reasonable inference of prior criminal activity.[16] In *Nichols*, *supra*, then Chief Justice Egan set forth the law concerning references to prior criminal conduct on the part of the accused:

> In Pennsylvania, the law is clear that if a testimonial reference [absent specific circumstances,] . . . indicates to the jury the accused has been involved in prior criminal activity, reversible error has been committed.

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[16] *Nichols*, 485 Pa. 1, 400 A.2d 1281 (1979).

Commonwealth v. Turner, 454 Pa. 439, 311 A.2d 899 (1973).

485 Pa. at 4, 400 A.2d at 1281-82.

The standards governing the courtroom conduct of a prosecutor are well-established. The prosecutor's duty "is to seek justice, not merely to convict." *Commonwealth v. Potter*, 445 Pa. 284, 287, 285 A.2d 492, 494 (1971). It is therefore improper for her to engage in conduct that diverts the jury from its duty to decide the case solely upon the admissible evidence. *Commonwealth v. Harvell*, 458 Pa. 406, 327 A.2d 271 (1974). Thus, a prosecutor may not use arguments or stratagems that are calculated to inflame the jury's passions or appeal to its prejudices. *Commonwealth v. Bricker*, 506 Pa. 571, 487 A.2d 346, 353 (1985). She may not refer to or argue on the basis of facts that are outside the record. *Commonwealth v. Toney*, 474 Pa. 243, 248, 378 A.2d 310, 312 (1977). A prosecutor may not ask legally objectionable questions that are designed to bring inadmissible evidence to the jury's attention. ABA Standards for Criminal Justice, the Prosecutor's Function, Standard 3-5.6 (b) (hereinafter, ABA Standards). The prosecutor is bound by our law to argue only those inferences that derive reasonably from the evidence at trial. *Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233 (1976).

Here, the prosecutor failed to conform her conduct to these standards. It is the [31] burden of the Commonwealth to establish that its misconduct did not affect the outcome of the trial. *Commonwealth v. Bricker*, at 589-91, 487 A.2d at 355. The Pennsylvania Supreme Court has outlined the reviewing court's inquiry:

> We must first be able to declare a belief that the error was harmless beyond a reasonable doubt before it will be held harmless and a judgment of sentence affirmed. Furthermore, the burden of establishing that the error was harmless beyond a reasonable doubt must be borne by the prosecution. Applying this two part analysis in *Davis* we said that if there is a reasonable possibility that the error "Might have moved 'the minds of an average jury' toward conviction . . ." the error cannot be held harmless.

Commonwealth v. Collins, 462 Pa. 495, 503, 341 A.2d 592, 495 (1975) (quoting *Commonwealth v. Davis*, 452 Pa. 171, 177, 305 A.2d 715, 719 (1973).

In the instant matter, the lower court took great effort to redact statements of co-defendants and protect the integrity of its evidentiary rulings and gave limiting or cautionary instructions to the jury. This was not enough to overcome the prejudice suffered by appellant and there was no overwhelming evidence herein to moot this prejudice. An examination of the record discloses a prosecutorial strategy rooted in gaining the admission of unlawful evidence and harassment of the defense through persistent and improper suggestion.[17] Because of the extent and specificity of the lower court's evidentiary rulings, the prosecutor's actions in this case must be considered as intentional and in bad faith.

Prejudice results where the testimony conveys to the jury either expressly, or by reasonable implication, the fact of a prior criminal offense. *Commonwealth v.*

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[17] These action[s] are addressed individually in each of the subsections of Argument II.

Riggins, 478 Pa. 222, 386 A.2d 520 (1978); *Commonwealth v. Banks*, 454 Pa. 401, 311 A.2d 576 (173). [32] The inference of past criminal conduct is unmistakable here and far beyond that evidence which the trial judge agreed to allow. The references were clearly improper, causing severe and irreparable prejudice to appellant.

It is firmly settled that "[a] reference either expressly or by reasonable implication, to prior criminal activity, which does not qualify as a recognized exception to the general rule excluding evidence of an accused's prior criminal conviction . . . is impermissible." *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982) (citing *Penn*, 497 Pa. 232, 439 A.2d 1154 (182); *Roots*, 482 Pa. 33, 393 A.2d 364 (1978); *Terrell*, 234 Pa. Super. 325, 339 A.2d 112 (1975)). *Accord*, *Washington*, 488 Pa. 133, 411 A.2d 490 (1979 ("a testimonial reference indicating to the jury that the accused had been engaged in other criminal activity, denies the accused a fair trial . . ."); *Spruill*, 480 Pa. 601, 391 A.2d 1048 (1978) ("evidence of prior criminal activity . . . is probably only equaled by a confession in its prejudicial impact upon a jury").

A prosecutor may not introduce evidence of other criminal acts of the accused, unless the evidence is substantially relevant for some purpose other than showing a probability that he committed the crime for which he is on trial, because he is a man of criminal character. *McCormick on Evidence* § 190 at 447 (2d Ed. 1972); *See Commonwealth v. Crawley*, 514 Pa. 539, 526 A.2d 334, 343 (1987).

In *Commonwealth v. Styles*, 494 Pa. 524, 431 A.2d 978 (1981), our Supreme Court stated:

> [t]he purpose of this rule is to prevent the conviction of the accused for one crime by the use of evidence that he has committed in other unrelated crimes, and to preclude the inferences that because he has committed other crimes he was more likely to commit that crime for which he is being tried. The presumed effect of such evidence is to predispose the [33] minds of the jurors to believe the accused guilty, and thus effectively strip him of the presumption of innocence.

494 Pa. at 527, 431 A.2d at 980. *Accord*, *Commonwealth v. Bryant*, 545 Pa. 473, 530 A.2d 83 (1987) (reversal of first degree murder and burglary convictions because of testimony concerning details of a prior burglary conviction).

C. Detective Joseph Walsh Impermissibly Twice Testified That He Determined That the Only Witness Who Inculpated Appellant Was Truthful.

Just as a prosecutor may not give her personal opinion about a defendant's credibility, *Commonwealth v. Brawner*, 381 Pa. Super. 265, 553 A.2d 458 (1989), neither may a homicide detective give his personal opinion about the truthfulness of a witness, especially when that witness, Demond Jackson, is the whole case against appellant. This is because a homicide detective is a public official, who wears a special mantle of importance and credibility. Our Supreme Court made this clear in *Commonwealth v. Russell*, 456 Pa. 559, 322 A.2d 127 (1974) (former prosecutor had "no doubt" of the defendant's guilt after reviewing the evidence). In *Russell*, the Court held

that when such a witness "in effect, expressed his opinion that all the defense witnesses were lying, and in this case the credibility of the witnesses was the crucial determination the jury had to make. Where the ultimate issues in the case rest upon a resolution of such conflicting testimony as the jury was faced with instantly, we have no alternative but to hold this is reversible error." *Russell*, 456 Pa. 559, 322 A.2d 127, 130. *Russell* only involved a former prosecutor. Herein, Detective Walsh is a current official, making his pronouncement even more impressionable upon the jury and, therefore, more objectionable than what occurred in Russell, where Our [34] Supreme Court reversed a conviction for the murder of a police officer.

It was reversible error for Detective Walsh to tell the jury his personal belief as to the truth or falsity of the evidence specifically, the credibility of Commonwealth witness Demond Jackson. This conduct by the detective was in the nature of prosecutorial misconduct, the detective being the agent of the prosecutor. The law is clear that a prosecutor must not convey to the jury either expressly or by reasonable implication any act of prior criminal activity attributable to the defendant. *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982). The detective's testimony that he believed that Jackson was truthful[18] caused extreme and irreparable prejudice to appellant, since Jackson, whose testimony was contradictory and who was completely impeached by defense counsel, was the only Commonwealth witness to inculpate appellant. The detective made this impermissible statement twice. *Id.* The trial judge disapproved of the

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[18] (N.T. 3/6/96 88 and 97.)

detective giving his opinion. (N.T. 3/6/96 97-98). Yet, the detective did it again. This certainly made an indelible impression on the jury, which could not be set aside notwithstanding the best of curative instructions given with the best of intentions. On both occasions, a mistrial was requested and improperly denied. (N.T. 3/6/96 91-2 and 98.) Therefore, appellant's conviction can not stand. As a result of this severe prejudice, only a new trial will satisfy the constitutional guarantee of justice for all. Any harmless error analysis will reveal that this conviction is not supported by such overwhelming evidence which would make this harmless error.

It should be noted that Detective Walsh's impermissible testimony occurred during the cross-examination by co-defendant Atil Finney's counsel and again impermissibly during [35] co-defendant Naree Abdullah's counsel's cross-examination. (N.T. 3/6/96 87-88 and 97.) Detective Walsh's testimony was unresponsive to the actual questions posed. However, had a severance been granted, this would not have happened, because your brief writer cross-examined in such a way that did not give the detective any opportunity to taint this trial with his prohibited personal opinions about the truthfulness of Demond Jackson.

D. Violating Redaction, Where Neither the Appellant Nor the Co-Defendants Testified, the Prosecutor in Her Summation Argued That the Confessions of Two Co-Defendants Corroborated That They Committed This Crime With the Others As She Gestured Toward Appellant and His Co-Defendants.

Prosecutorial misconduct denied appellant a fair trial. The standards governing the courtroom conduct of a prosecutor are well-established. The prosecutor's duty "is to seek justice, not merely to convict." *Commonwealth v. Potter*, 445 Pa. 284, 287, 285 A.2d 492, 494 (1971). It is therefore improper for her to engage in conduct that diverts the jury from its duty to decide the case solely upon the admissible evidence. *Commonwealth v. Harvell*, 458 Pa. 406, 327 A.2d 271 (1974). Thus, a prosecutor may not use arguments or strategems that are calculated to inflame the jury's passions or appeal to its prejudices. *Commonwealth v. Bricker*, 506 Pa. 571, 487 A.2d 346, 353 (1985). She may not refer to or argue on the basis of facts that are outside the record. *Commonwealth v. Toney*, 474 Pa. 243, 248, 378 A.2d 310, 312 (1977). A prosecutor may not inject her personal opinion of a defendant's credibility into evidence, *Commonwealth v. Brawner*, 381 Pa. Super. 265, 553 A.2d 458 (1989). Nor may she ask legally objectionable questions that are designed to bring inadmissible evidence to the jury's attention. ABA Standards for Criminal Justice, the [36] Prosecutor's Function, Standard 3-5.6 (b) (hereinafter, ABA Standards). The prosecutor is bound by our law to argue only those inferences that derive reasonably from the evidence at trial. *Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233 (1976). It is likewise improper for a prosecutor to ask questions that imply the existence of a factual predicate for which a good-faith basis is lacking. *Id.*, Standard 3-5.7 (d). And it is error for her to suggest to the jury her personal belief as to the truth or falsity of the evidence or as to the guilt of the defendant.

Here, the prosecutor failed to conform her conduct to these standards. It is the burden of the Commonwealth to establish that its misconduct did not affect the outcome of the trial. *Commonwealth v. Bricker*, at 589-91, 487 A.2d at 355. The Pennsylvania Supreme Court has outlined the reviewing court's inquiry:

> We must first be able to declare a belief that the error was harmless beyond a reasonable doubt before it will be held harmless and a judgment of sentence affirmed. Furthermore, the burden of establishing that the error was harmless beyond a reasonable doubt must be borne by the prosecution. Applying this two part analysis in *Davis* we said that if there is a reasonable possibility that the error "Might have moved 'the minds of an average jury' toward conviction . . ." the error cannot be held harmless.

Commonwealth v. Collins, 462 Pa. 495, 503, 341 A.2d 592, 495 (1975) (quoting *Commonwealth v. Davis*, 452 Pa. 171, 177, 305 A.2d 715, 719 (1973)).

Herein, the lower court made a great effort to redact statements of co-defendants and protect the integrity of its evidentiary rulings with limitations on counsel and cautionary instructions to the jury. An examination of the record discloses a prosecutorial strategy rooted in gaining the admission of unlawful evidence and harassment of the defense through [37] persistent and improper suggestions. Because of the extent and specificity of the lower court's evidentiary rulings, the prosecutor's actions in this case must be considered as intentional and in bad faith.

The prosecutor's position as both an administrator of justice and as an advocate "gives him the responsibility not to be vindictive or to attempt in any matter to influence the jury by arousing prejudices." *Commonwealth v. Revty*, 449 Pa. 516, 295 A.2d 302 (1982). In particular, the prosecutor must limit his argument to facts in evidence and legitimate inferences therefrom. Our Courts have held that a new trial is required where the cumulative effect of a prosecutor's misconduct so prejudiced defendant that a fair trial was impossible. In *Commonwealth v. Bricker*, 506 Pa. 571, 487 A.2d 346 (1985), defendant was granted a new trial where this Court determined that the repeated instances of prosecutorial misconduct, including references to a defense witness as a liar and a drug dealer, references to the defendant as a cold blooded-killer, and references to prior criminal activity on the defendant's part, permeated the entire trial proceedings, depriving defendant of a fair trial.

In *Commonwealth v. Collins*, 462 Pa. 495, 341 A.2d 492 (1975) the defendant was granted a new trial based on prosecutorial misconduct. The misconduct included arguments not supported by the record indicating that the victim had died a slow and painful death. It also included attempts in the course of trial to try the defendant as a drug pusher, although that was not an issue. In *Commonwealth v. Hickman*, 319 Pa. Super. 261, 466 A.2d 148 (1983), the Court held that the defendant was entitled to a new trial where the improper remarks of the district attorney deprived the defendant of a fair trial. There the district attorney breached his duty to refrain from improper remarks, demonstrated before [38] the jury his predisposition

against the defendant and, in fact, commented unfairly upon the credibility of the witness.

In reviewing these contentions, the oft-cited principle must be kept in mind that as a quasi-judicial officer, the prosecutor has a duty to seek justice, not just convictions; to protect the innocent and guard the rights of defendants, as well as to convict the guilty and enforce the public's rights. *Commonwealth v. Gilman*, 470 Pa. 179, 368 A.2d 253 (1977); *Commonwealth v. Long*, 258 Pa. Super. 251, 392 810 (1978). The prosecutor may not express a personal belief and opinion as to the truth or falsity of the evidence of defendant's guilt, including the credibility of witnesses. *Commonwealth v. Kuebler*, 484 Pa. 358, 399 A.2d 116 (1979) (where defendant's version of events was granted a "big lie"); ABA Standards for Criminal Justice Standards relating to the prosecution function § 5.8(b) (Approved Draft 1971). Our Courts have adopted § 5.8 of the ABA Project on Standards for Criminal Justice, Standards relating to prosecution function to serve as a guideline for determining when in a closing argument a prosecutor has overstepped hers responsibility to present a disinterested, impartial, and fair assessment of trial evidence. *See Commonwealth v. Van Cliff*, 483 Pa. 567, 397 A.2d 1173, *cert. denied* 441 U.S., 964 (1974). Determining whether these established bounds of propriety have been exceeded, our appellate courts have always been aware that the jury might give special weight to the prosecutor's arguments not only because of the prestige associated with this office, but also because of the fact-finding facilities presumably available to him. 483 Pa. at 580, 397 A.2d at 1172 citing ABA Standards § 5.8, commentary at 126-127.

In applying these guidelines, it has been held that the prosecutor's intrusion into the [39] jury's exclusive function of evaluating the credibility of the witnesses, by injecting his personal opinion in the defendant's guilt or credibility, is so prejudicial that a new trial is the only effective remedy. *Commonwealth v. Grant*, 479 Pa. 74, 387 A.2d 841 (1978); *Commonwealth v. Constantine*, 372 Pa. 327, 372 A.2d 720 (1977); *Commonwealth v. Joyner*, 469 Pa. 333, 365 A.2d 1233 (1976); *Commonwealth v. Gilman*, *supra*; *Commonwealth v. Swift*, 291 Pa. Super. 90, 435 A.2d 234 (1981).

Nor is the prosecutor permitted during closing argument to argue facts not proved, distort the law, misstate evidence, express a personal opinion as to the credibility of defense witnesses and trial strategy. *Commonwealth v. Pfaff*, 477 Pa. 461, 384 A.2d 1179 (1978); *Commonwealth v. Joyner*, *supra*; *Commonwealth v. Henry*, 5 Pa. Super. 47, 440 A.2d 1215 (1982); *Commonwealth v. Bullock*, 266 Pa. Super. 526, 405 A.2d 943 (1979); *Commonwealth v. Long*, *supra*; *Commonwealth v. Bricker*, *supra*.

Instantly, the prejudicial remarks and gestures permeating the prosecutor's closing argument so exceeded these bounds of propriety that appellant was denied a fair trial. In her closing argument, the prosecutor made the appellant's defense antagonistic to that of his co-defendants whose confessions were admitted — Finney and Womack. Appellant's defense was to plead not guilty, rely on his presumption of innocence, not testify, and require the Commonwealth to prove his guilt beyond a reasonable doubt. There surely was that before the Assistant District Attorney Ruiz pointed at him and his co-defendants and said

that their confessions corroborated that they did this crime with the others. (N.T. 3/8/96 64-67.) This violated the purpose of the redaction and adds additional prejudice resulting from the lower court's failure to grant the severance motion. Prosecutorial misconduct [40] aborted justice. Her pointing at appellant turned the co-defendants' confessions into constructive antagonistic "testimony" against him. This resulted in severe prejudice, which would have been avoided by severance of appellant's case. *See Commonwealth v. Marinelli*, No. 17 Capital Appeal Docket, Eastern District of Pennsylvania (Pa. 2/25/97).

This misconduct violates the aforementioned ABA Standards as well as principles of fair play and decency, and the judge's rulings. Just as in *Commonwealth v. Collins*, *supra*, 462 Pa. at 499, the Court said that misconduct was not limited to isolated moments of error in the heat of trial advocacy. The record is replete with instances of misconduct which permit only one reasonable conclusion: from the beginning of trial, the prosecutor adopted a strategy calculated to try the case on her own terms rather than within the rules of evidence and the standards of professional conduct. In total disregard of the trial judge's rulings and in violation of the standards of permissible trial conduct, the prosecutor succeeded in irreparably prejudicing appellant's defense. Therefore, reversal is required in the interests of justice.

III. Under the Circumstances Of This Case, It Was Error for the Trial Judge to Admit Evidence Of a Separate Attempted Robbery, Which He Had Ruled Was Not a Signature Crime.

It was error for the learned trial judge to admit evidence which tended to show another robbery or attempted robbery that the appellant and some of the other co-defendants allegedly committed. Because a severance was not granted, this error was compounded when Officer Mitchell McKeever violated the judge's instructions to the prosecutor limiting his testimony. By testifying that co-defendant Julius Jenkins pointed a [41] gun at him and pulled the trigger, this witness, in effect, established that on another occasion appellant and his companions committed an attempted murder of the officer.

The standard of review on evidentiary issues is whether or not the trial judge abused his discretion. *Commonwealth v. Banks*, 513 A.2d 318, 512 A.2d 1 (1987), *cert. denied* 484 U.S. 873 (1987). In the instant matter, the learned trial judge correctly ruled that the Ace Check cashing robbery was not a signature crime, but allowed limited evidence from it to show acquaintanceship, access to a gun, and similarity of the car. (Appendix "A" 8.) This was done after argument (out of the jury's presence) on a motion *in limine* brought by your brief writer. (N.T. 3/5/96 4-12.) This ruling was erroneous, constituting an abuse of discretion, since the probative value of this evidence was substantially outweighed by its prejudicial effect. However, the trial court took great pains to ensure that his ruling was properly executed by the Assistant District Attorney and her witness, Officer Mitchell McKeever. (N.T. 3/5/96 p.12 and 20.) In *Nichols*, *supra*, then Chief Justice Egan set forth the law concerning references to prior criminal conduct on the part of the accused:

> In Pennsylvania, the law is clear that if a testimonial reference [absent specific circumstances,] . . . indicates to the jury the accused has been involved in prior criminal activity, reversible error has been committed. *Commonwealth v. Turner*, 454 Pa. 439, 311 A.2d 899, (1973).

485 Pa. at 4, 400 A.2d at 1281-82.

Prejudice results where the testimony conveys to the jury either expressly, or by reasonable implication, the fact of another criminal offense. *Riggins*, 478 Pa. 222, 386 A.2d 520 (1978); *Banks*, 454 Pa. 401, 311 A.2d 576 (173). The inference of past criminal conduct is unmistakable here and far beyond that which the trial judge intended to allow into [42] evidence. The references were clearly improper, causing severe and irreparable prejudice to appellant. This is especially true because the particular activity testified to by Officer McKeever suggests a murderous disposition, severely prejudicing appellant in light of the instant murder charge against him.

It is firmly settled that "[a] reference either expressly or by reasonable implication, to prior criminal activity, which does not qualify as a recognized exception to the general rule excluding evidence of an accused's prior criminal conviction . . . is impermissible." *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982) (citing *Penn*, 497 Pa. 232, 439 A.2d 1154 (182); *Roots*, 482 Pa. 33, 393 A.2d 364 (1978); *Terrell*, 234 Pa. Super. 325, 339 A.2d 112 (1975). *Accord, Washington*, 488 Pa. 133, 411 A.2d 490 (1979 ("a testimonial reference indicating to the jury that the accused had been engaged in other criminal activity,

denies the accused a fair trial . . ."); *Spruill*, 480 Pa. 601, 391 A.2d 1048 (1978) ("evidence of prior criminal activity . . . is probably only equalled by a confession in its prejudicial impact upon a jury').

It is a principle of long standing in this Commonwealth that evidence of a distinct crime except under special circumstances, in inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of the other, and the effect of such evidence is to create prejudice in the jury's mind. *Commonwealth v. Fortune*, 464 Pa. 367, 373, 346 A.2d 783 (1975); *Commonwealth v. Wable*, 382 Pa. 80, 84, 114 A.2d 335, 336 (1955); *Commonwealth v. Morris*, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981); *Commonwealth v. Bryant*, 575 Pa. 473, 530 A.2d 83 (1987).

A prosecutor may not introduce evidence of other criminal acts of the accused, unless the evidence is substantially relevant for some purpose other than showing a [43] probability that he committed the crime for which he is on trial, because he is a man of criminal character. *McCormick on Evidence* § 190 at 447 (2d Ed. 1972); *See Commonwealth v. Crawley*, 514 Pa. 539, 526 A2d 334, 343 (1987). By the lower court's own rulings, limiting the facts of the Ace Check Cashing incident that could be elicited, there was no signature crime here. (Appendix "A.") The trial judge tried to take a middle ground, allowing in some facts from the other incident, but excluding others. This was a dangerous path that unavoidably led to the jury receiving testimony on facts the judge intended to be excluded. The prejudice was both predictable and did

actually occur. As a result appellant must be afforded a new trial.

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[1]

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[SEAL]
LYNNE ABRAHAM
District Attorney

September 22, 1997

David A. Szewczak, Esquire
Prothonotary, Superior Court of Pennsylvania
530 Walnut Street – Suite 315
Philadelphia, PA 19106

RE: **LETTER BRIEF**
Commonwealth v. Jarmaine Q. Trice
No. 1829 Philadelphia 1996; and
Commonwealth v. Gregory Womack
No. 1952 Philadelphia 1996

Dear Mr. Szewczak:

Jarmaine Trice and Gregory Womack, defendants herein, along with their co-defendants, Julius Jenkins, Atil Finney, and Naree Abdullah, committed a gunpoint robbery at a North Philadelphia grocery store, during which they shot the owner of the store to death. Trice and Womack now appeal from the judgments of sentence imposed following their convictions of second degree murder, three counts of robbery, and criminal conspiracy.[1] Because their

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[1] Information No. 118 1/6 and 6/6, June Term, 1995. On May 30, 1997, this Court granted the Commonwealth's application for uniform briefing in these appeals.

identical claims are completely lacking in merit, the Commonwealth opposes the grant of any relief.[2]

[2]

FACTUAL AND PROCEDURAL HISTORY[3]

On December 11, 1993, at or about 6:30 p.m., defendants and their co-defendants Jenkins, Finney, and Abdullah, along with Demond Jackson, who had asked for a ride, travelled from Germantown to North Philadelphia in Womack's 1979 Oldsmobile station wagon. Womack parked the vehicle around the corner

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[2] The appeals of co-defendants Finney and Abdullah were dismissed for failure to file timely appellate briefs. *See Commonwealth v. Atil Finney*, No. 1946 Philadelphia 1996 (appeal dismissed on March 4, 1997); *Commonwealth v. Naree Abdullah*, No. 2102 Philadelphia 1996 (appeal dismissed on February 10, 1997). [2] The appeal of co-defendant Jenkins was considered by a panel of this Court, which rejected his challenge to the sufficiency of the evidence to sustain his conviction of first degree murder and affirmed the imposition of a sentence of life imprisonment. *See Commonwealth v. Julius Jenkins*, No. 1819 Philadelphia 1996, J. No. S28004/97 (Memorandum Decision filed on July 28, 1997).

[3] The statement of the case sections in defendants' appellate briefs are in obvious violation of Pa.R.A.P. 2117(b), which provides: "The statement of the case shall not contain any argument. It is the responsibility of appellant to present in the statement of the case a balanced presentation of the history of the proceedings and the respective contentions of the parties." *Id.* Here, defendants' discussion of the factual and procedural history of this case, particularly with respect to the missing testimony of Commonwealth witness Demond Jackson, is so slanted and blatantly partisan as to constitute little more than an auxiliary argument section. *See Commonwealth v. Maris*, 427 Pa. Super. 566, 570-571, 629 A.2d 1014, 1016 (1993); *Commonwealth v. Rodgers*, 413 Pa. Super. 498, 507, 605 A.2d 1228, 1233 (1992), *alloc. denied*, 532 Pa. 655, 615 A.2d 1311 (1992).

from Lilly's Market, which was located at 3122 West York Street. Trice and co-defendants Jenkins, Finney and Abdullah then got out of defendant Womack's car and walked toward the store. Jackson stayed in the car with Womack. Trice and the others entered the market, where Jenkins approached the counter, pulled out a gun and announced a holdup. Francisco Azcona, the owner of the store, was crouched down behind the counter. His wife, Anna Azcona, and his sister-in-law, Andrea Rodriguez, were standing behind the counter in view of [3] the robbers. When Jenkins went behind the counter and saw Mr. Azcona, he fired a single shot penetrating the victim's jaw and neck, severing his carotid artery and causing him to bleed to death. Both Mrs. Azcona and her sister, Ms. Rodriguez, said that three or more men had entered the market and committed the robbery, and both women positively identified Jenkins as the man who fatally shot Mr. Azcona. (N.T. 2/26/96, 108-109, 114-120, 127-131, 179-186; 2/27/96, 2-23, 61-82, 114-117; 3/5/96, 26-33; 3/6/96, 11-31). [4]

After the robbery, Demond Jackson saw the four men return to Womack's car. At this time, Trice was carrying a cash register. Jackson's account was

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[4] As noted in defendants' briefs, the testimony of Demond Jackson has apparently been lost by the court stenographer who recorded the trial testimony in this case. The Commonwealth attempted to locate this testimony, but its efforts were unavailing. Accordingly, since there has never been any attempt by the defense to reconstruct the lost portions of the record as required by Pa.R.A.P. 1923, references to Demond Jackson's testimony in this brief are based on the trial notes and recollections of the trial prosecutor, and the summary of Jackson's testimony in the closing arguments made at trial by the prosecutor and defense counsel.

corroborated in large part by Keenan Roach, who was on his way to Lilly's Market when he saw four young men "trotting" down the street, with one of the men carrying a gun and another a cash register. Womack then drove the men to co-defendant Abdullah's house, where the money from the cash register was divided between the conspirators. Demond Jackson refused to take a share of the proceeds. Three days later, on December 14, 1993, Trice, Womack, and co-defendants Jenkins and Abdullah went to the Ace Check Cashing Agency at 2400 North 29th Street, which was located approximately two blocks from Lilly's Market. After [4] entering and exiting that establishment,[5] they walked back to Womack's station wagon. Co-defendant Jenkins was observed by a police officer with a gun and was subsequently arrested. The .45 caliber gun possessed by Jenkins was subsequently determined to be the same weapon used to murder Francisco Azcona. In addition, following their arrests in connection with the murder and robberies at Lilly's Market, Womack

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[5] Inside the check cashing agency they committed another robbery, but the trial judge ultimately ruled that this fact was inadmissible. The court had initially ruled, pre-trial, that evidence of the Ace Check Cashing robbery would be admissible to "show a common plan, scheme and design and methodology and access to the weapon that was used in fact in this murder case" (N. T. 2/12/96, 16). At trial, however, in response to a defense motion, the court altered its previous ruling to exclude any mention of the robbery at the check cashing agency, but to permit the Commonwealth to show that four of the five co-conspirators were together three days after the robberies and murder at Lilly's Market, and that codefendant Jenkins was in possession of the murder weapon at that time (N.T. 2/26/96, 60-62; 3/5/96, 4-20). The jury was thereafter clearly instructed as to the limited purpose for which this evidence could be considered (N.T. 3/5/96, 90-91; 3/11/96, 12-14).

and co-defendant Atil Finney made inculpatory statements to police admitting their participation in those crimes. Finney admitted to entering the store along with the other robbers and to sharing in the proceeds of the crime, while Womack admitted to driving the other robbers to and from Lilly's Market and to taking a share of the proceeds.[6] (N.T. 2/26/96, 138-149; 3/5/96, 39-41, 62-73, 76-77, 94-104, 106-120, 125-129; 3/6/96, 32-39, 41-46).

[5] On June 22, 1995, the Commonwealth filed notice of its intent to try the defendants and all of their co-defendants jointly pursuant to Pa.R.Crim.P. 1127. Trice filed a severance motion on July 25, 1995, alleging that he would be prejudiced by a joint trial because the Commonwealth was seeking the death penalty for co-defendant Julius Jenkins, and because the inculpatory statements of other co-defendants would be admitted into evidence. The motion also contained a general averment that the defenses of the co-defendants would be "antagonistic" to that of Trice's. Womack joined in this severance motion on July 26, 1995. Argument on the severance motions was heard on August 14, 1995 and October 2, 1995 before the Honorable Carolyn Engel Temin, who denied them on November 13, 1995. Thereafter, jury selection commenced on February 12, 1996 and was completed on February 22, 1996. On February 26, 1995, a suppression motion in which Womack contested the

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[6] At trial, these statements were admitted into evidence, but all references to the names of the other participants in the crimes were redacted. The trial court, moreover, clearly instructed the jury on several occasions that each statement could only be considered as evidence against the person who made it (N.T. 3/5/96, 125; 3/8/96, 69; 3/11/96, 14, 16).

voluntariness of his statement to police was heard and denied. The jury was then sworn and trial commenced before the Honorable John J. Poserina, Jr.

After a lengthy trial, the jury returned its verdicts on March 13, 1996, finding both Trice and Womack guilty of second degree murder, three counts of robbery, and criminal conspiracy.[7] [6] Defendants were immediately sentenced to life imprisonment on their convictions of second degree murder and, on May 13, 1996, they each received additional consecutive sentences of five to ten years for one of the robbery counts of which they were convicted.[8] These appeals followed.[9] Because Trice and Womack make virtually identical arguments, this Court granted a uniform briefing schedule, and the Commonwealth is filing a uniform brief in response to their claims.[10]

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[7] Co-defendants Finney and Abdullah were convicted of identical charges, while co-defendant Jenkins was found guilty of first degree murder, three counts of robbery, criminal conspiracy, and possession of an instrument of crime. A penalty hearing was held for Jenkins on March 14, 1996, at which the jury determined that the mitigating circumstances outweighed the aggravating circumstances and, accordingly, imposed a sentence of life imprisonment.

[8] No further penalty was imposed on defendants' remaining convictions of two counts of robbery, and conspiracy.

[9] Womack does not include in his brief a statement of the scope and standard of review as required by Pa. R. A. P. 3518 (a). While such a statement does appear in Trice's brief, the Commonwealth does not agree with the content thereof. Accordingly, the Commonwealth has set forth the appropriate standards in the argument sections below.

[10] The statement of the issues contained in Womack's table of contents and statement of the questions involved is organized differently than the discussion of the issues in the argument

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[15]

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING DEFENDANTS' MOTIONS TO SEVER THEIR TRIALS FROM THOSE OF THEIR CO-DEFENDANTS.

Defendants next argue that their trials should have been severed from those of their co-defendants because one of the co-defendants, Julius Jenkins, was subject to the death penalty while they and their other two co-defendants were not. Thus, they complain that they were forced to stand trial before a death qualified jury. Defendants also complain that they were prejudiced by the admission of statements made by non-testifying codefendants. While acknowledging that these statements were redacted to exclude any reference to the names of the other participants in the crime, defendants allege that the redaction was supposedly inadequate and that it was allegedly "polluted" by [16] instances of what they characterize as police and prosecutorial misconduct throughout the trial. These contentions, however, are without support in either law or fact and provide no basis whatsoever for relief.

A motion for severance of the trials of multiple defendants is addressed to the sound discretion of the trial court, and the trial court's denial of such a motion may not be reversed on appeal absent a manifest

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section of his appellate brief. The Commonwealth has addressed the issues in the order and manner in which they appear in the argument section of Womack's brief, which is virtually identical to the argument section of Trice's appellate brief.

abuse of discretion. *Commonwealth v. Cull*, 688 A.2d 1191, 1197 (Pa. Super. 1997), *alloc. denied*, 1997 Pa. Lexis 1152 (Pa. June 16, 1997). *See also Commonwealth v. Lambert*, 529 Pa. 320, 331, 603 A.2d 568, 573 (1992); *Commonwealth v. Morales*, 508 Pa. 51, 61, 494 A.2d 367, 372 (1985). Defendants, as appellants herein, bear the burden of demonstrating that they suffered manifest prejudice as a result of the denial of their severance motions; and they cannot meet that burden by simply asserting that their chances of acquittal would have been better had severance been granted. *Commonwealth v. Lindenmuth*, 381 Pa. Super. 398, 409, 554 A.2d 62, 67 (1989), *alloc. denied*, 522 Pa. 624, 564 A.2d 916 (1989). *See also Commonwealth v. Patterson*, 519 Pa. 190, 197, 546 A.2d 596, 599-600 (1988).

Where, as in this case, the crimes charged against each defendant arise out of the same facts and much of the same evidence is applicable to all defendants, the general policy in this Commonwealth encourages joint trials to conserve limited resources and promote judicial economy by eliminating the duplication of evidence in separate proceedings. *See Commonwealth v. Jones*, 542 [17] Pa. 464, 485, 668 A.2d 491, 501 (1995), *cert. denied*, 117 S. Ct. 89 (1996); *Commonwealth v. Rodriguez*, 695 A.2d 864, 871 (Pa. Super. 1997); *Commonwealth v. Childress*, 452 Pa. Super. 37, 44, 680 A.2d 1184, 1187 (1996), *alloc. denied*, 689 A.2d 231 (Pa. 1997); *Commonwealth v. Zaslow*, 448 Pa. Super. 289, 296, 671 A.2d 707, 711 (1996), *alloc. denied*, 546 Pa. 680, 686 A.2d 1310 (1996). Therefore, "[w]here conspiracy is charged, co-defendants should be tried together." *Commonwealth v. Presbury*, 445 Pa. Super. 362, 366, 665 A.2d 825,

327 (1995), *alloc. denied*, 544 Pa. 627, 675 A.2d 1246 (1996). *See also Commonwealth v. Marinelli*, 690 A.2d 203, 212-213 (Pa. 1997); *Commonwealth v. Paolello*, 542 Pa. 47, 70,665 A.2d 439, 451 (1995); *Commonwealth v. Chester*, 526 Pa. 578, 589, 587 A.2d 1367, 1372 (1991), *cert. denied*, 502 U.S. 959 (1991).[15] Viewed according to these well-established principles, defendants are clearly entitled to no relief. [18]

A. Defendants were not entitled to severance due to the death qualification of the jury with respect to co-defendant Jenkins.

Here, the first reason defendants advance in support of their severance claim is that they were improperly subjected to a death qualified jury because the Commonwealth was seeking – but did not obtain – the death penalty against co-defendant Jenkins, but not against them. On this basis they claim that their trials should have been severed from that of co-

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[15] Defendants have made absolutely no showing their defenses and those of their co-defendants were in any way antagonistic. Neither defendants nor any of their co-defendants testified at trial and, except for Trice's mother, no defense witnesses were called. The common strategy of the defense was to attack the credibility of the Commonwealth's witnesses – particularly Demond Jackson – while arguing to the jury that the Commonwealth had not met its burden of proof. (Co-defendant Finney conceded his presence at Lilly's Market during the robberies, but asserted that the Commonwealth failed to prove his participation or agreement to commit any crimes.) None of the defendants or co-defendants attempted to point fingers at each other or to argue that one was more culpable than another. Thus, far from being antagonistic, the defense strategies in the instant case were consistent. Therefore, any claim by defendants that severance was required because of antagonistic defenses is simply false.

defendant Jenkins. Defendants, however, can make absolutely no showing that they were tried by anything other than a fair and impartial jury, and, as such, they simply cannot show that they were in any way prejudiced by the trial court's refusal to sever their trial from that of co-defendant Jenkins. In fact, their claim that the selection of a death qualified jury denied them various constitutional protections has been flatly rejected by both the United States and Pennsylvania Supreme Courts.

Defendants' primary contention is that they allegedly were denied a jury of their peers – *i.e.*, one comprised of a representative cross-section of the community – because persons who would not follow the law with respect to the death penalty, but who could have imposed a sentence of life imprisonment, were stricken for cause from serving on the jury. According to defendants, their "peers" include people both for and against the death penalty. This claim is patently absurd.[16]

[19] In *Lockhart v. McCree*, 476 U.S. 162 (1986), the United States Supreme Court rejected a

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[16] Defendants also assert, without making any specific legal argument, that the death qualification of the jury in this case [19] violated their constitutional rights to due process and equal protection. These claims are waived. This Court has held that "the mere assertion of error, without elaboration, will not be addressed." *Commonwealth v. Holmes*, 444 Pa. Super. 257, 261, 663 A.2d 771, 773 (1995). *See Commonwealth v. Garcia*, 443 Pa. Super. 414, 427-428, 661 A.2d 1388, 1395-1396 (1995), *alloc. denied*, 543 Pa. 709, 672 A.2d 304 (1996) (claim waived where not supported by proper argument). In any event, the Commonwealth will demonstrate *infra* that the death qualification of the jury in no way denied defendants their constitutional right to a fair trial before an impartial fact finder.

claim that the death qualification process violated the Sixth Amendment's fair cross-section requirement. The *McCree* Court held that the fair cross-section requirement does not extend to the selection of a petit jury and could not be invoked to invalidate either challenges for cause or peremptory strikes. Rather, the Court concluded that the fair cross-section requirement applies only to the selection of jury panels or venires. *Id.*, 476 U.S. at 173-174. The *McCree* Court, moreover, further concluded that, even if the constitutional fair cross-section requirement could somehow be extended to the composition of individual juries, persons who could not impose the death penalty would not constitute a distinctive group in the community whose exclusion would violate this constitutional guarantee. *Id.*, 476 U.S. at 174-177.[17] *See also Commonwealth v. Hudson*, 455 Pa. 117, [20] 121-122, 314 A.2d 231, 234 (1974) (rejecting argument that removal for cause of veniremen opposed to death penalty unconstitutionally denies a defendant of a jury of his or her peers).

The Supreme Court in *McCree* went on to reject any notion that a jury which has been death qualified violates the constitutional requirement of an impartial jury. In this regard, the Court reasoned as follows:

> In our view, it is simply not possible to define jury impartiality, for constitutional purposes, by reference to some hypothetical mix of individual viewpoints. Prospective jurors come from many

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[17] The Supreme Court distinguished the removal for cause of persons who could not impose the death penalty under any circumstance from situations involving "the wholesale exclusion of [20] blacks, women, or Mexican Americans from jury service." *Lockhart v. McCree*, *supra* at 175.

> different attitudes and predispositions. But the Constitution presupposes that a jury selected from a fair cross section of the community is impartial, regardless of the mix of individual viewpoints actually represented on the jury, so long as the jurors can conscientiously and properly carry out their sworn duty to apply the law to the facts of the particular case.

Id., 476 U.S. at 183-184.

The rationale of *Lockhart v. McCree*, therefore, makes it abundantly clear that, as a matter of federal constitutional law, defendants were neither denied a jury which was selected from a fair cross-section of the community, nor were they denied a jury that was fair and impartial. The same conclusion applies under the Pennsylvania Constitution. Our Supreme Court has applied the reasoning of *Lockhart v. McCree*, *supra* both as a matter of federal and state constitutional law. *See Commonwealth v. Sneed*, 514 Pa. 597, 605, 526 A.2d 749, 753 (1987). *See also Commonwealth v. Williams*, 514 Pa. 62, 70-71, 522 A.2d 1058, 1062 (1987); [21] *Commonwealth v. Dehart*, 512 Pa. 235, 249-252, 516 A.2d 656, 663-665 (1986), *cert. denied*, 483 U.S. 1010 (1987); *Commonwealth v. Peterkin*, 511 Pa. 299, 320-321, 513 A.2d 373, 384 (1986), *cert. denied*, 479 U.S. 1070 (1987). Additionally the Pennsylvania Supreme Court has repeatedly rejected the argument that death qualified juries are conviction prone, *see Commonwealth v. McCullum*, 529 Pa. 117, 134, 602 A.2d 313, 321 (1992); *Commonwealth v. Bryant*, 524 Pa. 564, 573-574, 574 A.2d 590, 595 (1990); *Commonwealth v. Lewis*, 523 Pa. 466, 476, 567 A.2d 1376, 1381 (1989); *Commonwealth v. Hughes*, 521 Pa. 423, 460-461, 555 A.2d 1264, 1283 (1989), and

the Court has unequivocally held that the death qualification process is consistent with constitutional guarantees to a fair trial. *See Commonwealth v. Crawley*, 514 Pa. 539, 558, 526 A.2d 334, 344 (1987) ("We have held that death qualification does not deprive the defendant of a fair determination of guilt or innocence."); *Commonwealth v. Smith*, 511 Pa. 343, 351, 513 A.2d 1371, 1375 (1986), *cert. denied*, 480 U.S. 951 (1987) ("This Court has repeatedly held that the 'death qualification process' is consistent with constitutional trial guarantees."). *See also Commonwealth v. Marinelli*, *supra*, 690 A.2d at 216; *Commonwealth v. Lambert*, *supra*, 529 Pa. at 335-336, 603 A.2d at 575-576; *Commonwealth v. Aulisio*, 514 Pa. 84, 90, 522 A.2d 1075, 1078 (1987).

In light of the foregoing authorities, it is clear that defendants have demonstrated no prejudice as a result of being [22] tried before a jury which had been death qualified with respect to their co-defendant Julius Jenkins. Defendants have not even alleged – let alone offered any proof – that any members of the jury in this case were incapable of making a fair determination of their guilt or innocence. This alone is fatal to any claim of prejudice as a result of the death qualification process. *See Commonwealth v. Marshall*, 523 Pa. 556, 567, 568 A.2d 590, 595 (1989). *Cf. Commonwealth v. Colson*, 507 Pa. 440, 453, 490 A.2d 811, 818 (1985), *cert. denied*, 476 U.S. 1140 (1986) (death qualification of jury in case where appellant was not properly subject to death penalty held not to be basis for new trial). Thus, absent any showing of prejudice resulting from the death qualification of the jury, defendants simply have not met their burden of proving that the trial court committed a manifest

abuse of discretion by refusing to sever their trial from that of co-defendant Jenkins. This is especially so where the so called "death qualified" jury did not even return a verdict of death against co-defendant Jenkins. Nothing in the record even remotely suggests that defendants were tried before anything other than a completely fair and impartial jury.

Moreover, severance in the instant case would have been particularly inappropriate. The charges against defendants and Jenkins arose out of the same facts, all were charged with conspiracy, and much of the same evidence was equally applicable to defendants and Jenkins. Moreover, this was a lengthy trial in which the Commonwealth called numerous witnesses. Absent manifest [23] prejudice to defendants, the interests of justice would not have been served by requiring the expensive and time consuming duplication of evidence at separate trials. Under these circumstances, where manifest prejudice to defendants was clearly lacking, no abuse of discretion was committed by the trial court.

B. Defendants were not entitled to severance due to the admission of redacted versions of inculpatory statements made by non-testifying co-defendants where such statements did not explicitly incriminate them, and where the jury was properly instructed that each statement could be considered as evidence against only against [sic] the maker of the statement.

Defendants also contend that severance should have been granted due to the introduction of inculpatory statements made by non-testifying co-

defendants. Specifically, the statements of Womack and co-defendant Atil Finney were introduced into evidence at trial. These statements, however, were redacted to remove any explicit reference to the other defendants in the case. The trial court, moreover, instructed the jury several times that these statements could only be considered as evidence against the defendants who made them. On appeal, Trice contends that redaction of the statements of Womack and co-defendant Finney was an inadequate remedy in this case, and that the trial court should have granted his request for severance instead. Womack makes an identical argument limited to the confession of co-defendant Finney. According to defendants, the denial of their severance requests denied them their Sixth Amendment right of confrontation as set forth in *Bruton v. United States*, 391 U.S. 123 [24] (1968).[18] There is absolutely no merit in this contention.

A similar claim was flatly rejected by the Pennsylvania Supreme Court in *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996), *cert. denied*, 116 S. Ct. 1831 (1996). In that case, all references to the appellant in his two co-defendants' statements were replaced with an "X," and the trial court instructed the jury that such statements could only be considered as evidence against the co-defendant who made the statement. In rejecting the appellant's claim

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[18] In *Bruton*, the United States Supreme Court held that the introduction of a non-testifying co-defendant's confession which explicitly incriminates another defendant deprives that defendant of his constitutional right of confrontation with respect to the non-testifying co-defendant.

that severance should have been granted the *Miles* Court observed:

> [T]he substitution of the letter "X" for a defendant's name does not violate that defendant's *Bruton* rights if a proper limiting instruction is given, as it was in this case. Thus, because [appellant] has failed to demonstrate how being tried with co-defendants unduly prejudiced him, this claim fails.

Id. at 511, 681 A.2d at 1300 (*citing Commonwealth v. Lee*, 541 Pa. 260, 662 A.2d 645 (1995)). This same rationale was recently applied in both *Commonwealth v. Anthony Washington*, No. 86 Capital Appeal Dkt., J-249-1996 (filed August 20, 1997) and *Commonwealth v. Vinson Washington*, 692 A.2d 1018 (Pa. 1997).[19] The appellants in both of these cases had argued that severance should have been granted because they were [25] prejudiced by the admission of their co-defendant's redacted confessions which referred to neither appellant by name. *See Commonwealth v. Anthony Washington*, *supra* (substituting word "Blank" for the appellant's name); *Commonwealth v. Vinson Washington*, *supra* (substituting the phrase "the guy with me" for the appellant's name). Furthermore, the juries in both cases were carefully instructed to consider the co-defendant's inculpatory statement only against the maker of the statement. In holding that no abuse of discretion occurred in denying the severance motions in either case, the Pennsylvania Supreme Court declared that:

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[19] Although both of these cases involve appeals in capital cases, the cases are otherwise unrelated.

> It is well-settled . . . that no *Bruton* violation occurs if the co-defendant's statement is redacted to remove any specific references to the defendant and if a proper limiting instruction is given. *See Richardson v. Marsh*, 481 U.S. 200 (1987); *Commonwealth v. Jones*, 542 Pa. 464, 495-96, 668 A.2d 491, 506 (1996).

Commonwealth v. Anthony Washington, *supra*, (Slip Op. at 7); *Commonwealth v. Vinson Washington*, *supra*, 692 A.2d at 1020. Thus, because the appellants had failed to establish a *Bruton* violation, they could not establish manifest prejudice which would have required severance.

This Court, as well, has found redaction of a co-defendant's statement to be preferable to severance in cases where conspiracy is charged, noting that "[t]he interests of judicial economy commend redaction over severance in a joint trial of co-conspirators." *Commonwealth v. Marsh*, 388 Pa. Super. 610, 615, 566 A.2d 296, 298 (1989) (quoting *Commonwealth v. Hess*, 378 Pa. Super. 221, 240, 548 A.2d 582, 592 (1988), *alloc. denied*, 522 Pa. 618, 563 [26] A.2d 887 (1989)). *See also Commonwealth v. Pirela*, 398 Pa. Super. 76, 82-83, 580 A.2d 848, 851-852 (1990), *alloc. denied*, 527 Pa. 672, 594 A.2d 658 (1991); *Commonwealth v. Council*, 355 Pa. Super. 442, 448-450, 513 A.2d 1003, 1006-1007 (1986), *alloc. denied*, 517 Pa. 664, 548 A.2d 253 (1988).

Instantly, the inculpatory statement of co-defendant Finney referred to neither defendants nor any other co-defendant by name, but rather, it was redacted so that other participants in the robberies and murder at Lilly's Market were referred to with

neutral terms such as "we," "they," "he," "guy," "guys," "someone," and "someone else" (N.T. 3/5/96,117-127). The statement of Womack was redacted in similar fashion to eliminate any specific reference to Trice or any of the other co-defendants (N.T. 3/6/96, 38-45). Thus, neither Trice nor Womack were specifically incriminated by anything contained in the statement of a non-testifying co-defendant. Moreover, the trial court in this case clearly instructed the jury throughout the trial that it could consider the statements of Finney and Womack as evidence against only the **maker** of each statement (N.T. 3/5/96, 125; 3/8/96, 69; 3/11/96, 14, 16). Under these circumstances, the decided cases hold that no *Bruton* violation occurred and, thus, the trial court did not abuse its discretion by refusing to grant defendants' requests for severance. *See Commonwealth v. Anthony Washington*, *supra*; *Commonwealth v. Vinson Washington*, *supra*; *Commonwealth v. Miles*, *supra*.

Defendants' assertion that the instant case is indistinguishable from *United States v. Bruton*, *supra* and *Cruz v.* [27] *New York*, 481 U.S. 186 (1987) is simply absurd. Both *Bruton* and *Cruz*[20] involved the admission of unredacted statements of non-testifying co-defendants which directly implicated other defendants in a joint trial. *Bruton* and *Cruz*, therefore, merely stand for the proposition that a limiting

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[20] In *Cruz*, the United States Supreme Court rejected a theory of "interlocking" confessions and held that the rule in *Bruton* was applicable where a non-testifying co-defendant's unredacted statement, which directly implicated the defendant by name, was introduced at their joint trial, despite the fact that the co-defendant's statement was corroborated by the defendant's own confession.

instruction telling the jury to consider a co-defendant's confession only as evidence against its maker will not suffice in situations where the co-defendant's confession has not been redacted. This is so because the risk that the jury would disregard such an instruction would be too great where the confession **directly** implicated another defendant in a joint trial. By contrast, in the instant case, the statements of co-defendant Finney and Womack were redacted to eliminate any direct reference to other defendants in the case. This distinction – which defendants fail to comprehend – is of crucial importance.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), the United States Supreme Court refused to extend the rationale of *Bruton* to the situation where a co-defendant's statement has been redacted and, thus, does not explicitly incriminate another defendant in a joint trial. Rather, the Supreme Court recognized the "important distinction" between unredacted confessions of co-defendants, which directly implicate [28] the defendant, and redacted confessions of co-defendants, which can only become incriminating of the defendant when linked with other evidence introduced at trial. The Court observed that *Bruton* created only a "narrow exception" to the "almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, *supra* at 206-208. The *Richardson* Court, therefore, held that juries are presumed to follow a court's limiting instruction regarding a co-defendant's confession where such confession does not explicitly incriminate the

defendant, *i.e.*, where the confession has been redacted. *Id.* at 208-211.[21]

[29] Defendants suggest that *Richardson* must be construed to mean that only those confessions of co-defendants which are redacted to eliminate not only any reference to the defendant's name, but also to the **existence** of the defendant, are not violative of the rule in *Bruton*. A fair reading of *Richardson*, however, does not support this suggestion. While the confession at issue in *Richardson* had been redacted to eliminate any reference to the defendant's existence, the Supreme Court specifically left open the question of "the admissibility of a confession in which the defendant's name has been replaced with a symbol or

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[21] In so holding, the Supreme Court rejected any suggestion that severance should be required in all cases where a co-defendant's confession is admitted into evidence. Recognizing the vital role of joint trials, particularly in conspiracy cases, the Court said:

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessments of relative culpability – advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. Marsh, *supra* at 210 (footnote omitted).

neutral pronoun." *Richardson v. Marsh*, *supra* at 211 n. 5. Subsequently, several federal appeals courts have answered this open question by holding that the admission of redacted confessions of a co-defendant which replace the defendant's name with symbols or neutral pronouns do not violate *Bruton*. *See United States v. Jones*, 101 F.3d 1263, 1269-1270 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1566 (1997); *United States v. Gio*, 7 F.3d 1279, 1286-1287 (7th Cir. 1993), *cert. denied*, 515 U.S. 1102 (1995); *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1359 (9th Cir. 1993); *United States v. Washington*, 952 F.2d 1402, 1404-1407 (D.C. Cir. 1991), *cert. denied sub nom., Jones v. United States*, 503 U.S. 1009 (1992); *United States v. Alvarado*, 882 F.2d 645, 651-653 (2d Cir. 1989), *cert. denied*, 493 U.S. 1071 (1990); *United States v. Vasquez*, 874 F.2d 1515, 1517-1518 (11th Cir. 1989), *cert. denied*, 493 U.S. 1046 [30] (1990).

Pennsylvania courts clearly follow this approach. *See e.g., Commonwealth v. Anthony Washington*, *supra* (*Bruton* not violated where defendant's name in co-defendant's confession was replaced with the word "Blank"); *Commonwealth v. Vinson Washington*, *supra* (*Bruton* not violated where defendant's name in co-defendant's confession was replaced with the phrase "the guy with me"); *Commonwealth v. Miles*, *supra* (*Bruton* not violated by substitution of the letter "X" for defendant's name in confession of co-defendant); *Commonwealth v. Presbury*, *supra*, 445 Pa. Super. at 367-371, 665 A.2d at 828-830 (*Bruton* not violated by substitution of "the other guy" for defendant's name in confession of co-defendant); *Commonwealth v. Rawls*, 276 Pa. Super. 89, 419 A.2d 109 (1980), *appeal dismissed*, 499 Pa. 267, 452 A.2d 1347 (1982) (*Bruton*

not violated by redacted references in co-defendant's confession to "other fellows," "they," "someone," and "one of the guys").

Accordingly, in the instant case it is clear that the redacted statements of Womack and Finney were not introduced in violation of the rule in *Bruton*. The statement of Finney did not directly implicate either Trice or Womack, nor did Womack's statement directly implicate Trice. And, as already noted, the trial court extensively instructed the jury that these statements could only be considered as evidence against the person who made the statement. Under these circumstances, redaction was clearly a permissible alternative to severance, especially in light of the strong preference for joint trials for co-conspirators. The trial court, [31] therefore, did not abuse its discretion in refusing to grant defendants' requests for severance.

C. Defendants' hindsight attempts to prove prejudice stemming from the denial of their severance motions must fail.

Implicitly recognizing that they were not impermissibly implicated by the properly redacted confessions of non-testifying co-defendants, defendants purport to identify four instances during trial in which the redaction of the confessions was allegedly "polluted" by what they characterize as police and prosecutorial misconduct. By these four examples of alleged police and prosecutorial misconduct, defendants seek to argue by hindsight that the trial court abused its discretion by denying their severance motions. Whether or not to sever the trials of codefendants, however, is a pre-trial issue, *see*

Commonwealth v. La, 433 Pa.Super. 432, 456, 640 A.2d 1336, 1349 (1994), *alloc. denied*, 540 Pa. 597, 655 A.2d 986 (1994), and error in this regard simply cannot be predicated on events which occur during trial long after the pre-trial ruling has been made.

Further the incidents which defendants now identify, for the most part, constitute nothing more than ordinary allegations of trial error of a type which can commonly arise in both joint and single defendant trials alike. These claims bear no special relationship to a trial judge's denial of pre-trial severance motions and, in fact, pertain to matters which the trial judge could not have foreseen at the time the pre-trial severance ruling was made. Nevertheless, the Commonwealth will address each of the four "severance-related" claims advanced by defendants, and will [32] demonstrate conclusively that defendants suffered no manifest prejudice as would establish hindsight "proof" of their entitlement to severance.

1. Officer McKeever's testimony on cross-examination did not violate the trial court's ruling on the admissibility of evidence pertaining to the subsequent incident at the Ace Check Cashing Agency.

As evidence of the prejudice they purportedly suffered as a result of their trials not being severed, defendants point to testimony given by Officer Mitchell McKeever during cross-examination by counsel for co-defendant Jenkins, when the officer said that Jenkins had fired a gun at him during the Ace Check Cashing incident which occurred three days after the robberies and murder at Lilly's Market. Defendants claim that this testimony implicated them

in a crime for which they were not on trial, *i.e.*, the attempted aggravated assault or murder of a police officer. This claim is absurd. The complained of testimony was elicited during questioning by counsel for co-defendant Jenkins and pertained solely to the actions of Jenkins, not Trice or Womack. Thus, the jury could not have reasonably inferred any unrelated criminal conduct on defendants' part. This is especially so in light of the forceful cautionary instruction given by the trial court in relation to this incident.

Prior to Officer McKeever's testimony, the trial court ruled that the subsequent incident at the Ace Check Cashing Agency would be admissible for the limited purpose of showing the association of four of the conspirators and to establish their access to the murder weapon and vehicle used in connection with the crimes at [33] Lilly's Market three days earlier (N.T. 3/5/96, 4-20).[22] On direct examination, Officer McKeever testified that on December 14, 1993, he saw Trice and Womack, along with co-defendants Jenkins and Abdullah enter and exit the Ace Check Cashing Agency.[23] After they left the check cashing agency, Officer McKeever saw co-defendant Jenkins with a gun and followed the four men to defendant Womack's car which was parked nearby with the engine running. Thereafter, the officer testified that Jenkins was arrested and the gun he was carrying was recovered by police near a log located about five feet from

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[22] The propriety of the trial court's ruling regarding the admissibility of this evidence will be addressed *infra* in section III. of the Commonwealth's brief.

[23] Apparently, co-defendant Finney was not involved in this subsequent incident.

Jenkins at the time of his arrest (N.T. 3/5/96, 62-73, 76-77).

While Officer McKeever was being cross-examined by counsel for co-defendant Jenkins, the following occurred:

Q. Okay. After [Jenkins], as you testified, got nto the vehicle, you lost sight of the gun?

A. That's correct.

Q. And the next time you saw the gun was vhen it was five feet away from him, correct?

A. No, when he pointed the gun at me and ›ulled the trigger and when his hand jerked.

Q. Well –

A. That's the next time I saw the gun.

Q. You say he pulled the trigger?

A. That's correct.

Q. Did any bullets come towards you?

[34]

A. I do not know at that time. His hands erked.

Q. So you don't know if he pulled the trigger?

A. I know that he pulled the trigger. Your ıand goes in a jerking motion, pulling the rigger.

Q. Officer, let me ask you a question. You fired your weapon at these individuals?

A. Yes, I did.

Q. How many Rounds did you discharge?

A. Knowing now eleven rounds.

(N.T. 3/5/96, 78-79).

Thereafter, when Jenkins' counsel further attempted to cross-examine the officer about his being questioned by Internal Affairs, the prosecuting attorney objected and requested a sidebar conference. At sidebar, counsel for Womack moved for a mistrial and counsel for Trice renewed his severance motion. The trial court determined that a mistrial was unnecessary, but that it would give the jury a cautionary instruction to disregard Officer McKeever's testimony about Jenkins' firing of the gun during the incident at Ace Check Cashing (N.T. 3/5/96, 79-86). Specifically, the court instructed the jury as follows:

> THE COURT: Over the luncheon break counsel met in chambers and I am directing the jury now.
>
> You heard some testimony from this witness and I ask you not – or I order you now to disregard the testimony about who may have shot anybody or shot at anybody at a second incident which was three days after the case that is on trial here. That other incident is not on trial before you. The sole purpose of even mentioning that is whether or not any of the persons involved in this case were seen together, that is they were related or somehow cooperated or working with each other on another occasion; and secondly, whether or not the weapon that was actually recovered in the second case had anything to [35] do with this first case. . . That's the only two functions, the people knew each other and possession of the

gun and that's it. All the other stuff, just disregard.

(N.T. 3/5/96, 90-91).

Defendants argue that Officer McKeever's testimony regarding Jenkins shooting at him during the Ace Check Cashing incident violated the limitations which the trial court had placed on evidence regarding that incident. They claim that the officer's testimony somehow implicated them in the crime of attempted murder or aggravated assault of a police officer, and that such prejudicial references to unrelated criminal conduct would not have occurred if their trial had been severed. Moreover, even though this testimony was elicited on cross-examination, defendants suggest that the prosecutor was somehow guilty of misconduct for not properly coaching the officer on how to testify concerning the Ace Check Cashing incident.

Defendants' claim that Officer McKeever's testimony implicated them in unrelated criminal conduct is simply unfounded. Rather, the officer's testimony about shots having been fired during the Ace Check Cashing incident was clearly limited to the conduct of Jenkins, and in no way implied that either Trice or Womack fired a gun at him or attempted to assault or murder him. The officer merely responded to a question, asked by Jenkins' own counsel, regarding his observation of the gun possessed by Jenkins. This testimony was not prejudicial to Trice and Womack, as it did not implicate them in any criminal conduct regarding the subsequent incident at Ace Check Cashing. *See Commonwealth v. Morris*, 513 Pa. [36] 169, 176, 519 A.2d 374, 377 (1986) (relief not

warranted unless "testimony conveys to the jury, either expressly, or by reasonable implication, the fact of [an unrelated] criminal offense" committed by defendant).

Moreover, even assuming that Officer McKeever's cross-examination testimony could somehow be tortured into implicating defendants in unrelated criminal conduct, any possible prejudice was cured by the trial court's forceful instruction to the jury to disregard such testimony. The Pennsylvania Supreme Court has declared that a curative instruction given by the trial court "may alleviate any harm to the defendant that results from references to [unrelated] criminal conduct." *Commonwealth v. Morris*, *supra* at 176, 519 A.2d at 377.[24] It is within the trial court's discretion to determine whether a cautionary instruction will suffice rather than the more drastic remedy of declaring a mistrial. *See Commonwealth v. Shawley*, 522 Pa. 475, 481, 563 A.2d 1175, 1177-1178 (1989) (Opinion In Support Of Affirmance); *Commonwealth v. Neives*, 399 Pa. Super. 277, 285, 582 A.2d 341, 345 (1990), *alloc. denied*, 529 Pa. 633, 600 A.2d 952 (1991). Factors to be considered in making this determination include the nature of the

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[24] *See e.g., Commonwealth v. Richardson*, 496 Pa. 521, 437 A.2d 1162 (1981)(mistrial deemed unnecessary where jury was cautioned to disregard witness' testimony about prior burglary of same residence for which appellant was then on trial for burglarizing); *Commonwealth v. Povish*, 479 Pa. 179, 387 A.2d 1282 (1978)(grant of mistrial was not required where jury was instructed to disregard testimony about unrelated robbery charge against appellant); *Commonwealth v. Whitfield*, 474 Pa. 27, 376 A.2d 617 (1977) (mistrial not necessary where jury told to disregard remark by witness that he had previously seen appellant "work people over").

references, [37] whether such testimony was intentionally elicited by the Commonwealth, and whether the prosecutor attempted to further exploit the jury's exposure to the defendant's unrelated crimes. *See Commonwealth v. Richardson*, 496 Pa. 521, 526-527, 437 A.2d 1162, 1165 (1981); *Commonwealth v. Bonace*, 391 Pa. Super. 602, 611-612, 571 A.2d 1079, 1084 (1990), *alloc. denied*, 526 Pa. 647, 585 A.2d 466 (1990). A trial court is required to grant a mistrial only "where the incident upon which the motion is based is of such a nature as to deny the defendant a fair trial." *Commonwealth v. Johnson*, 542 Pa. 384, 398, 668 A.2d 97, 103 (1995), *cert. denied*, 117 S. Ct. 90 (1996).

A review of the circumstances surrounding Officer McKeever's testimony makes clear that the trial court's cautionary instruction was more than sufficient to alleviate any possible prejudice to defendants. First of all, the officer's testimony pertained to the actions of Jenkins alone and did not implicate the defendants. Secondly, the testimony was not elicited by the Commonwealth, but responded to cross-examination by counsel for Jenkins. Indeed, it was the prosecutor who first **objected** to this questioning and requested a sidebar conference (N.T. 3/5/96, 79-80).

During the sidebar, the prosecutor joined the objection of Trice regarding the line of questioning which was being pursued by counsel for Jenkins (N.T. 3/5/96, 83-84). Any suggestion on this record that the prosecutor was somehow responsible for the officer's testimony on cross-examination, therefore, is patently misleading and truly offensive. Finally, there was absolutely no [38] attempt made by the prosecutor to exploit Officer McKeever's testimony regarding

Jenkins' actions during the Ace Check Cashing incident.

Under all of these circumstances, the trial court did not abuse its discretion in denying the motion for mistrial or defendant Trice's renewed mid-trial severance request. Defendants simply have not met their burden of proving that they were prejudiced in any way by the officer's testimony in light of the court's forceful instruction directing the jury to disregard the same. The jury is presumed to follow such a cautionary instruction given by the trial court. *See Commonwealth v. Jones*, *supra*, 542 Pa. at 490-491, 668 A.2d at 503-504; *Commonwealth v. LaCava*, 542 Pa. 160, 182-184, 666 A.2d 221, 231-232 (1995). Accordingly, there is no basis for a hindsight conclusion that defendants' severance motions should have been granted because of testimony prejudicial to Jenkins that was elicited by Jenkins.

2. Defendants' claim that the prosecutor violated the trial court's ruling with respect to the Ace Check Cashing Agency incident is both waived and meritless.

Defendants continue to insist that Officer McKeever's testimony regarding the Ace Check Cashing incident somehow implicated them in other criminal activity unrelated to the crimes for which they were being tried. They additionally claim that the prosecutor committed misconduct by questioning the witness on direct examination regarding his arrest of co-defendant Jenkins. Specifically, the prosecutor asked the witness, "At some point did you subsequently arrest Mr. Jenkins?," to which Officer McKeever [39] responded, "Yes, I did" (N.T. 3/5/96, 72).

Defendants assert that this question and answer somehow violated the trial court's ruling with respect to the admissibility of evidence related to the subsequent Ace Check Cashing incident and constituted misconduct by the prosecutor. They are wrong. Not only did defendants waive any complaint in this regard by failing to object to the prosecutor's question or the officer's answer, but their claim of misconduct badly misrepresents the scope of the trial court's ruling with respect to evidence of the Ace Check Cashing incident. Indeed, the record makes clear that the prosecutor complied fully with the trial court's ruling.

Here, defendants did not object when the prosecutor asked Officer McKeever if he had arrested co-defendant Jenkins after observing him with a gun at Ace Check Cashing. This failure to make a contemporaneous objection to this testimony waives any claim with respect thereto on appeal. The law is well-settled that the failure to object in a timely manner at trial forecloses review of an alleged error on appeal. *Commonwealth v. Sanchez*, 416 Pa. Super. 160, 179, 610 A.2d 1020, 1030 (1992), *alloc. denied*, 533 Pa. 624, 620 A.2d 490 (1993). "In order to preserve an issue for review, a party must make a timely and specific objection at trial. The Superior Court will not consider a claim on appeal which was not called to the trial court's attention at a time when any error committed could have been corrected." *Commonwealth v. Montalvo*, 434 Pa. Super. 14, 31, 641 A.2d 1176, 1184 (1994) (*citing Commonwealth v. Smith*, 414 Pa. Super. 208, 214, 606 A.2d 939, 942 (1992), *alloc.* [40] *denied*, 533 Pa. 624, 620 A.2d 490 (1993)). Accordingly, by failing to object at trial to the prosecutor's alleged

improper question to Officer McKeever, defendants have waived their present contention that they suffered "severe and irreparable prejudice" as a result of this incident. This waived claim, therefore offers no support for defendants' hindsight attack on the trial court's denial of their severance motions.

Besides being waived, defendants' claim is also frivolous. Far from proving prosecutorial misconduct, the record in this case unescapably [sic] establishes that the prosecutor acted consistently with the trial court's ruling as to which aspects of the subsequent Ace Check Cashing incident would be admissible at defendants' trial. Defendants cite several pages of boiler-plate law regarding prosecutorial misconduct and other crimes evidence (Appellate Brief for Trice, 30-33; Appellate Brief for Womack, 26-30), but completely ignore the precise parameters of the trial court's ruling which they falsely accuse the prosecutor of violating.

In response to defense objections to the admissibility of any evidence relating to the Ace Check Cashing incident, the trial court held that no reference could be made to the robbery at the check cashing agency, but that the prosecutor could offer evidence of the defendants being together at that time; of their use of Womack's car on the subsequent occasion; and of the fact that, during the later incident, co-defendant Jenkins possessed the gun which turned out to be the murder weapon in the instant case (N.T. 3/5/96, 4-20). Specifically, the court ruled that the prosecutor [41] would be allowed to elicit testimony of co-defendant Jenkins' arrest after the Ace Check Cashing incident, but could not present evidence of the arrest of any of the other co-defendants (Trice, Womack, or Abdullah)

who were involved in that incident (N.T. 3/5/96, 17-20). Thus, it is abundantly clear that the prosecutor complied with the trial court's ruling when she asked Officer McKeever if co-defendant Jenkins had been arrested after the officer observed him with a gun at Ace Check Cashing. Therefore, defendants' claim of prosecutorial misconduct is totally belied by the record.

Nor did the testimony complained of implicate defendants in unrelated criminal activity. No reference was made to the robbery at the check cashing agency and the testimony regarding co-defendant Jenkins' arrest was directly related to his possession of the gun that was later determined to have been the murder weapon used at Lilly's Market. Besides reciting boiler-plate legal principles, defendants do not even suggest how this testimony implicated them in any criminal conduct unrelated to the charges for which they were standing trial. They certainly have not established that this brief question and answer during Officer McKeever's direct testimony in any way denied them a fair trial. As such, they again fail in their hindsight attempt to prove that they were prejudiced by the denial of their severance motions. [42]

3. Detective Walsh's testimony on cross-examination did not constitute improper opinion testimony as to Demond Jackson's credibility and, in light of the cautionary instructions given by the trial court, did not prejudice defendants in any way.

Defendants continue their hindsight attack on the denial of their severance motions by asserting that Detective Joseph Walsh, while being cross-examined

by counsel for co-defendants Finney and Abdullah, gave improper opinion testimony regarding the truthfulness of another Commonwealth witness, Demond Jackson. Defendants liken such testimony to a prosecutor's expression of personal opinion on witness credibility and contend that their motions for mistrial should have been granted. Defendants further assert that had severance been granted, this testimony would not have been elicited because their counsel did not cross-examine the witness in such a way that he had the opportunity to express his opinion about Demond Jackson's credibility.

These claims are meritless. Detective Walsh did not express his personal opinion as to Jackson's credibility as a witness; rather, he was merely explaining the course of his investigation. Moreover, the trial court instructed the jury to disregard any opinion on truthfulness that may have been expressed by Detective Walsh. Under these circumstances, defendants clearly have not established that they were so prejudiced by Detective Walsh's testimony that a mistrial should have been declared or that hindsight error should be found in the denial of their severance motions.

At trial, Detective Walsh described the investigation which [43] led to defendants' arrests. He testified that when he first interviewed Demond Jackson, Jackson had been regarded by police as a suspect, but after the interview and further investigation, Jackson was no longer considered a suspect (N.T. 3/6/96, 23-31). This point was further explored on cross-examination by counsel for co-defendant Finney as follows:

Q. And it was after [Jackson] gave you that statement that you then concluded that he was no longer a suspect; is that right?

A. The statement in – to other information we had received during the investigation.

Q. That other information had been received before he gave you the statement however?

A. Some of it before and some of it after, sir.

Q. So your conclusion that he was no longer a suspect is one that was not reached until sometime after February 27th, the date of this statement?

A. No, some of the information proved him to be truthful and other information received after the statement proved to be truthful and not be a suspect.

(N.T. 3/6/96, 87-88).

Defendants objected to the above testimony elicited by their co-defendant, and counsel for Trice requested a cautionary instruction. In response, the trial court instructed the jury as follows:

Members of the Jury, strike from the record and from your mind any reference to this officer's opinion or detective's opinion concerning truthfulness or non-truthfulness. That's for you to decide, not for him.

(N.T. 3/6/96, 88). After counsel for co-defendant Abdullah had concluded his cross-examination of Detective Walsh, counsel for Trice requested a sidebar conference, at which he moved for a [44]mistrial based upon the detective's alleged expression of his personal

opinion regarding Demond Jackson's truthfulness.[25] The trial court denied this request (N.T. 3/6/96, 91-93).

Subsequently, Detective Walsh was cross-examined by counsel for co-defendant Abdullah, whereupon the following exchange occurred:

> Q. You have also indicated on several occasions that Mr. Jackson was not someone with whom any type of – to us[e] another vernacular, any type of deal had been made, there had been no agreement or arrangement between your office or the District Attorney's office concerning Mr. Jackson and his cooperation in this case; is that correct?
>
> A. Yes, sir, that's correct.
>
> Q. If all of those previous things I asked you were correct, why did you tell Mr. Jackson that at some future time he would have to testify in this case, if it came to trial?
>
> A. Well, because what he told me and what I believed to be the truth –

(N.T. 3/6/96, 97).

Trice objected and moved to strike this testimony, after which the trial court further instructed the jury as follows:

> Again, I remind the jury that it's an improper comment for a police officer who is interviewing anybody to state whether or not the person is telling the truth or not. That's not the function,

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[25] Counsel for Womack joined this request.

> but the reason he's saying it, it can be offered as a partial explanation to tell you why he did what he did next. Because if he thought it was a lie, he would proceed in another course of action. He would do another. That doesn't mean it[']s true. That's for the jury to decide.

(N.T. 3/6/96, 97-98). Upon denying a second request for mistrial made by Trice, the trial court reiterated: [45]

> [T]he jury is told for the third time that they are not to accept an opinion concerning truthfulness or not for the accuracy of whether it's true or not. That's up to you.

(N.T. 3/6/96, 98).

Defendants attempt to liken Detective Walsh's testimony to a comment made by a prosecutor regarding the credibility of a witness.[26] This is simply

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[26] Defendants' reliance upon *Commonwealth v. Russell*, 456 Pa. 559, 322 A.2d 127 (1974) is seriously misplaced. In that case, a Commonwealth witness recanted a prior statement implicating the defendant and testified at trial that the defendant was not involved in the crimes being tried. In light of this surprise testimony, the Commonwealth called a former assistant district attorney as a witness in an attempt to impeach the turncoat witness. The Supreme Court held that a new trial was required because the former assistant district attorney usurped the jury's function by offering his personal opinion as to the defendant's guilt and as to the defense witnesses' lack of credibility. The Court opined that the testimony in question violated the rule prohibiting prosecutors from expressing their personal opinions either in argument or from the witness stand. The Court in *Russell* found this rule to be applicable to the testimony of a former prosecutor because the Commonwealth in that case had "cloth[ed] [the witness] in the vestiges of the office of district attorney." *Id.* at 564, 322 A.2d at 130. This case, by contrast, involves the testimony of a police detective, not a

nonsense. When viewed in context, it is clear that the witness was merely responding to questions by defense counsel, **asking him to explain why** Demond Jackson ultimately was dismissed as a suspect in the case and came to be viewed instead as a witness. The detective responded to this line of inquiry by explaining that he came to regard Jackson as a [46] witness rather than a suspect because, based upon his investigation, he deemed the information provided by Jackson to have been accurate. As noted by the trial court, Detective Walsh, in using the word "truthful," was not commenting on Jackson's credibility as a witness at trial, but rather, he was merely describing the course of his investigation in direct response to questions asked by counsel for co-defendants Finney and Abdullah. Obviously, if the detective had not believed Jackson's statement, the course of his investigation would have been different. Therefore, viewing the two brief references to Jackson's "truthfulness" in context, these references were not such as to have usurped the jury's role as the sole judges of witness credibility.

The lack of any prejudice to defendants resulting from Detective Walsh's testimony is especially obvious considering the instructions given by the trial court. The court made clear to the jury that the detective's

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prosecutor or former prosecutor, and defendants have identified no authority extending the holding in *Russell* to the testimony of police officers. In addition, Detective Walsh did not express any opinion regarding defendants' guilt, nor did he attempt to bolster the credibility of Demond Jackson's trial testimony. Rather, he merely responded to defense questions regarding why Jackson no longer was considered a suspect during the course of the police investigation into the robberies and murder at Lilly's Market. *Russell*, therefore, is clearly inapposite under the facts of the instant case.

testimony was not to be viewed as a comment upon Jackson's truthfulness, but as an explanation for the detective['s] subsequent conduct in conducting his investigation. The court, moreover, emphasized the jury's exclusive role in determining witness credibility, which was further reinforced in the court's final charge to the jury (N.T. 3/11/96, 4, 6-8).

The well-established law in this Commonwealth is that "[j]uries are presumed to follow the court's instructions." *Commonwealth v. LaCava*, *supra*, 542 Pa. at 182, 666 A.2d at 231. *See also Commonwealth v. Carter*, 537 Pa. 233, 265, 643 A.2d 61, 77 [47] (1994), *cert. denied*, 514 U.S. 1005 (1995); *Commonwealth v. Baker*, 531 Pa. 541 Pa. 541, 559, 614 A.2d 663, 672 (1992). Thus, even if [D]etective Walsh's testimony could somehow be construed as an expression of opinion regarding the credibility of Demond Jackson's trial testimony – which it clearly was not – the remarks were both brief and isolated, and the jury was extensively instructed as to its role as the sole judge of witness credibility. Under these circumstances, the detective's brief remarks could not have had any effect upon the outcome of defendants' trial – and certainly offer no hindsight "proof" that defendants' severance motions should have been granted.

4. The prosecutor did not violate the redaction of the statements of Womack and co-defendant Finney during her closing argument to the jury.

Defendants next assert that the prosecutor, in her closing argument, pointed at them and their co-defendants and said that the confessions of their non-testifying co-defendants corroborated their guilt.

Specifically, Trice complains of references by the prosecutor to the confessions of both Womack and co-defendant Finney, while Womack's argument is limited to the prosecutor's reference to co-defendant Finney's confession. The record, however, simply does not support their accusations.[27]

[48] In addressing the standard to be applied to claims of prosecutorial misconduct in closing argument, the Pennsylvania Supreme Court recently summarized the applicable law as follows:

> A prosecutor's remarks fall within the ambit of fair comment if they are supported by evidence and they contain inferences which are

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[27] In addition, it is clear from the record that Womack has waived any claim relating to the prosecutor's remarks about the statement of co-defendant Finney. While both Trice and Womack objected to the prosecutor's remarks, only Trice moved for a mistrial. In response, the trial court gave a cautionary instruction. Womack never objected to the court's cautionary [48] instruction nor requested any further relief. This can only be interpreted as an expression of satisfaction with the cautionary instruction which was given, and thereby waives any claim to greater relief on appeal. *See Commonwealth v. Glenn*, 459 Pa. 545, 548, 330 A.2d 535, 536 (1974). *See also Commonwealth v. Garcia*, 505 Pa. 304, 315 n. 5, 479 A.2d 473, 479 n.5 (1984) (waiver found where defense counsel did not move for mistrial after court sustained objection and issued curative instruction); *Commonwealth v. Jones*, 501 Pa. 162, 166, 460 A.2d 739, 741 (1983) (issue waived where defense counsel immediately objected to prosecutor's conduct but made no request for a mistrial or curative instructions); *Commonwealth v. Turner*, 390 Pa. Super. 216, 225, 568 A.2d 622, 626 (1989), *alloc. denied*, 527 Pa. 645, 593 A.2d 418 (1990) (where appellant objected to comment made by prosecutor in closing argument, court appropriately charged jury in response to comment, and no further objection was raised, claim was waived).

> reasonably derived from that evidence. A new trial is not mandated every time a prosecutor makes an intemperate or improper remark. To constitute reversible error, the language must be such that its unavoidable effect would be to prejudice the jury forming in their minds fixed bias and hostility towards the defendant, so that they could not weigh the evidence and render a true verdict.

Commonwealth v. Joseph Elliott, No. 0085 Capital Appeal Dkt., filed August 20, 1997 (Slip Op. at 17) (*quoting Commonwealth v. Hardcastle*, 519 Pa. 236, 254, 546 A.2d 1101, 1109 (1988), *cert. denied*, 493 U.S. 1093 (1990)). This inquiry, moreover, "is centered on whether the defendant is deprived of a fair trial, not deprived of a perfect one." *Commonwealth v. LaCava*, *supra*, 542 Pa. at 181, 666 A.2d at 231. Furthermore, any allegedly improper remarks by the prosecutor must [49] be viewed in the context of the whole closing argument. *See Commonwealth v. Smith*, 490 Pa. 380, 388, 416 A.2d 986, 989 (1980).

Defendants studiously avoid any detailed examination of the prosecutor's actual remarks of which they complain. Rather, they again rely upon a boiler-plate discussion of prosecutorial misconduct in general, and further launch a scurrilous and totally unsupported attack upon the integrity of the trial prosecutor, accusing her of engaging in a course of "intentional and bad faith" conduct from the beginning of trial, purportedly designed at "gaining the admission of unlawful evidence and harassment of the defense through persistent and improper suggestion" (Appellate Brief of Trice, 36-37; Appellate Brief of Womack, 34-35). Not only have defendants failed to

prove these slanderous accusations, but any fair reading of the record in this case can only lead to the conclusion that the prosecutor made every effort to comply with the trial court's various rulings and acted in complete good faith and within the bounds of proper trial advocacy.

Instantly, the prosecutor's comments about the confessions of Womack and Finney were as follows:

> Now, you know also by another piece of evidence that there has been an agreement, that there was going to be a robbery, because what Atil Finney says in his statement is he agreed with the **others** to get paid. When he was in that car with the **other people.** He agreed to get paid. That's another piece of evidence that the group had planned to in fact commit this robbery.
>
> . . . .
>
> [A]nd remember, that in Womack – in Defendant Womack's statement he in fact said **they** go over to the grocery store.

[50] (N.T. 3/8/96, 64-67) (emphasis added). At no point does the prosecutor mention the names of Trice or Womack in connection with co-defendant Finney's confession, nor did she mention Trice in connection with Womack's confession. Rather, consistently with the manner in which these statements were redacted, the prosecutor used the words "others," "other people," and "they." Thus, the prosecutor in no way suggested that the jury should use Finney's statement against Trice and Womack, nor that they should use Womack's statement as evidence against Trice.

Under similar circumstances, the Pennsylvania Supreme Court rejected a claim that a prosecutor had "broken redaction" during closing argument by using the word "they" while discussing the co-defendant's confession. *See Commonwealth v. Vinson Washington*, *supra*, 692 A.2d at 1021-1022. The *Washington* Court dismissed this claim as follows:

> Appellant contends that the prosecutor's use of the word "they" was an improper reference to Appellant, tying him in to [the co-defendant's] statement. We disagree. The use of the pronoun "they" was indicative of nothing more than the fact that [the co-defendant's] statement spoke of two men, [the co-defendant] and the "guy" with him. As such, the prosecutor's remark was insufficient to prejudice the jury against Appellant.

Id. The same rationale is clearly applicable in the instant case where the prosecutor's remarks did nothing more than mirror the redacted statements of Finney and Womack that multiple actors were involved. Nothing in the prosecutor's comments improperly violated the redaction of either Womack's or co-defendant Finney's confessions.

In any event, any imaginable harm from the prosecutor's [51] comments was alleviated by the cautionary instruction given by the trial court. After defendants objected to the prosecutor's above quoted remarks, the trial court denied a mistrial motion made by Trice but, in an abundance of caution, immediately instructed the jury as follows:

> Before the District Attorney continues any further I will remind you again of a point that I reiterated throughout the trial.
>
> The United States Constitution says that anybody accused of a crime has a right to confront his accuser. That means when somebody gives a statement out of court, not under oath, not subject to cross examination, that statement is usable only against the person who made it, nobody else. So whatever evidence you think you have heard, understand that it is the principle of law that must guide you that a statement is given by a person that is only usable against that person if in fact it was a voluntary, free-willed statement, which I'll explain to you later.

(N.T. 3/8/96, 69). As already noted, it is presumed in the law that the jury followed this instruction. *See Richardson v. Marsh*, *supra*. Accordingly, in light of the above cautionary instruction given by the trial court, defendants simply could not have been prejudiced by the prosecutor's extremely brief remarks concerning the statements of co-defendant Finney and Womack which were made in the context of a closing argument that covered thirty-eight pages of trial transcript.

As for defendants' allusion to the prosecutor's supposed gestures while briefly discussing the statements of Womack and co-defendant Finney, such matters are not subject to review on the cold record which is before this Court on appeal. Rather, it was for the trial judge – who was present and observed the closing [52] arguments – to evaluate in the first

instance whether the prosecutor's conduct unfairly prejudiced defendants. A trial court's determination in this regard is subject to appellate review pursuant to an abuse of discretion standard. *Commonwealth v. D'Amato*, 514 Pa. 471, 491, 526 A.2d 300, 310 (1987) (*quoting Commonwealth v. Simon*, 432 Pa. 386, 394, 248 A.2d 289, 292 (1968)). *See also Commonwealth v. Strong*, 522 Pa. 445, 454, 563 A.2d 479, 483 (1989), *cert. denied*, 494 U.S. 1060 (1990). Here, the trial court rejected any notion that the prosecutor's conduct unfairly prejudiced defendants and, thus, the court denied Trice's request for a mistrial. Viewing the prosecutor's closing argument as a whole, defendants have utterly failed to demonstrate that the trial court abused its discretion. Accordingly, defendants cannot avail themselves of this completely meritless prosecutorial misconduct claim to attack by hindsight the trial court's decision not to sever their cases.

* * * * *

[1]

COMMONWEALTH OF PENNSYLVANIA

vs.

JARMAINE Q. TRICE,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01829
Philadelphia 1996

Appeal from the Judgment of Sentence of May 13, 1996 in the Court of Common Pleas of Philadelphia County, Criminal No. 95-06-0118

COMMONWEALTH OF PENNSYLVANIA

vs.

GREGORY WOMACK,
Appellant

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 01952
Philadelphia 1996

Appeal from the Judgment of Sentence of May 13, 1996 in the Court of Common Pleas of Philadelphia County, Criminal No. 95-06-0118

BEFORE: CIRILLO, P.J.E., and SCHILLER and HOFFMAN, JJ.

FILED DEC 16 1997

MEMORANDUM:

Jarmaine Trice and Gregory Womack appeal from their respective judgments of sentence entered in the Court of Common Pleas of Philadelphia County following their convictions for second-degree murder, three counts of robbery, and criminal conspiracy. We affirm.

Trice, Womack, and co-defendants Julius Jenkins, Atil Finney, and Naree Abdullah, traveled from Germantown to North Philadelphia in Womack's 1979 Oldsmobile station wagon. Demond Jackson, who asked for a ride, also [2] accompanied them. Womack parked the car around the corner from Lilly's Market. Trice, Jenkins, Finney and Abdullah entered the market while Womack and Jackson stayed in the car. Once inside the store, Jenkins pulled out a gun and announced a holdup. Francisco Azcona, the store owner, was crouched behind a counter; Azcona's wife and sister-in-law were standing behind the counter where the perpetrators could see them. When Jenkins went behind the counter and discovered Mr. Azcona, he fired a single shot, penetrating the victim's jaw and neck. The gunshot wound caused Mr. Azcona to bleed to death. The four men returned to Womack's car, with Trice carrying a cash register. Womack drove the men to Abdullah's house, where the money from the cash register was divided among the cohorts.[1]

Trice, Womack, and their co-defendants were arrested shortly after the robbery. The .45 caliber gun possessed by Jenkins at the time of his arrest was subsequently determined to be the same weapon used

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[1] Demond Jackson refused to take a share in the proceeds.

in Francisco Azcona's murder. Womack and Finney made inculpatory statements to the police admitting their participation in the robbery/murder.

The Commonwealth filed notice of its intent to try all of the co-defendants jointly. Trice filed a motion for severance, which Womack joined. After argument was heard on the matter, the motion was denied. A jury trial was held before the Honorable John J. Poserina, Jr., and Trice and Womack were found guilty of second-degree murder, three counts of robbery, and criminal [3] conspiracy. Trice and Womack were sentenced to life imprisonment for second-degree murder, and were given consecutive prison terms of five to ten years for robbery. This appeal followed.

Trice and Womack raise the following issues for our consideration:

(1) Whether meaningful appellate review is possible where the trial court notes of testimony of witness Demond Jackson have been lost?

(2) Whether the trial court abused its discretion in denying defendants' motion to sever their trials from those of their co-defendants?[2]

(a) Whether it was error to allow Detective Joseph Walsh to state that he had determined that

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[2] Most of the sub-issues that appellants include under the motion to sever issue bear no relationship to the trial court's denial of the motion to sever; rather, most pertain to matters which the trial court could not have foreseen at the time the severance ruling was made. We will, however, address the claims even though they resemble ordinary allegations of trial error and not severance-related issues.

Commonwealth witness Demond Jackson was truthful?[3]

(b) Whether, in violation of the trial judge's instruction not to elicit testimony of another crime, it was error for the prosecutor to ask an officer if he had arrested a co-defendant for a separate attempted robbery?

(c) Whether it was error for Detective Joseph Walsh to twice testify that he had determined that the only eyewitness who inculpated defendant was truthful?

(d) Whether the prosecutor, in her summation, impermissibly argued that the confessions of co-defendant Finney corroborated that he committed [4] this crime with the others, as she gestured towards the other defendants?

(e) Whether it was error for the trial judge to admit evidence of a separate attempted robbery allegedly committed by the defendants and other co-defendants?

Trice and Womack initially assert that without the missing notes of testimony containing evidence presented by Demond Jackson, there is insufficient evidence to sustain their convictions. It is the duty of the appellant to supply an appellate court with a record sufficient to allow meaningful review. *Boyle v. Steiman*, 429 Pa. Super 1, __, 631 A.2d 1025, 1030 (1993); *School District of Aliquippa v. Maryland Casualty Co.*, 402 Pa. Super. 569, 575, 587 A.2d 765

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[3] Our disposition of this issue also satisfied appellants' issue 2(c). The two issues are basically the same, and the limiting instructions given by the trial court dispose of both issues.

A.2d 768-69 (1991). An appellant's failure to insure that the certified record contains adequate information to conduct meaningful appellate review results in waiver of the issues sought to be reviewed. *Boyle*, 429 Pa. Super. at __, 631, A.23 at 1030.

> When a transcript of proceedings is unavailable, our rules of court provide an alternative so as not to preclude appellate review. Pennsylvania Rule of Appellate Procedure 1923 states that if a transcript is unavailable, 'the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection.' Pa.R.A.P. 1923.[4]

[5] *Commonwealth v. Michuck*, 454 Pa. Super. 594, __686 A.2d 403, 408 (1996). The purpose of Pa.R.A.P. 1923 is to provide a reviewing court with an "equivalent picture" of the proceedings when a transcript is unavailable. *Boyle*, 429 Pa. Super. at __, 631 A.2d at 1030. Here, Trice and Womack claim only that meaningful appellate review is impossible. They have not availed themselves of the option to prepare a

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[4] Rule 1923 provides:

If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including his recollection. The statement shall be served on the appellee, who may serve objections or propose [5] amendments thereto within ten days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the lower court for settlement and approval and as settled and approved shall be included by the clerk of the lower court in the record on appeal.

statement portraying an "equivalent picture" of the transcript in question in accordance with Rule 1923. Accordingly, the appellants have waived any issues regarding Demond Jackson's testimony. *Boyle*, *supra*. *See Commonwealth v. Burrows*, 379 Pa. Super. 548, 550 A.2d 787 (1988) (where appellant refused to utilize Rule 1923 to fashion an equivalent picture of the proceedings at issue, the sufficiency of the evidence issues were waived and the judgment of sentence was affirmed; no meaningful appellate review of the sufficiency issues could have been accomplished).

In their next issue, the appellants claim that the trial court erred in denying their motion to sever their trials from those of their co-defendants. Criminal defendants may be joined in a single trial where the facts demonstrate that they allegedly participated in the same transaction. Pa.R.Crim.P. [6] 1127(A)(2). *See Commonwealth v. Presbury*, 445 Pa. Super. 362, 665 A.2d 825 (1995). When the defendants have been charged with conspiracy, joint rather than separate trials are preferred. *Commonwealth v. Jones*, 530 Pa. 591, 610 A.2d 931 (1992). Severance may be proper where a defendant can show that he will suffer prejudice by a joint trial. *Id.* at 602, 610 A.2d at 936. *See* Pa.R.Crim.P. 1128. It is well settled that a motion for severance is addressed to the sound discretion of the trial court, and that the decision reached by the trial court will not be disturbed absent a showing of manifest abuse of discretion. *Presbury*, 445 Pa. Super. at 366, 665 A.2d at 827-28 (citing *Jones*, 530 Pa. at 602, 610 A.2d at 936). The court, in determining whether to sever the trial of defendants, must balance the "need to minimize the prejudice that may be caused by consolidation against the general policy of

encouraging judicial economy." *Presbury*, 445 Pa. Super. at __, 665 A.2d at 828. The fact that there is a better chance of acquittal from a separate trial is not a sufficient reason to warrant severance. *Id.* Rather, the defenses that are presented by the defendants must be "irreconcilable and exclusive" and "conflict at the core" before the burden of substantial prejudice is met. *Id.* (citing *Commonwealth v. Bennie*, 352 Pa. Super. 558, 556, 508 A.2d 1211, 1215 (1986)).

Appellants claim that they were entitled to severance for a number of reasons. First, co-defendant Jenkins was subject to the death penalty and appellants were not. Trice and Womack assert that twenty-three prospective jurors were stricken solely due to the fact that they could not return a verdict of death. This, appellants claim, violated their right to a jury of their peers, i.e., one [7] comprised of a representative cross-section of the community. According to the appellants, their "peers" include people both for and against the death penalty.

The appellants have not alleged that any member of the jury was incapable of making a fair determination of their guilt or innocence. Absent a showing of prejudice resulting from the "death qualification" of the jury,[5] the appellants have not met their burden of proving that the trial court erred in

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[5] Questions asked of jurors as to whether they have any moral, religious or ethical beliefs that would prevent them from voting for the death penalty in a proper case is known as "death qualifying" the jury. *Commonwealth v. Hardcastle*, __ Pa. __, __ A.2d __ (1997) (slip opinion filed October 1, 1997). Its purpose is to exclude jurors who are not qualified to serve because they could not follow the law and impose the death penalty even where the law requires them to do so. *Id.*

refusing to sever their trials.[6] *Presbury, supra*, *Jones, supra*. Moreover, the charges against all co-defendants arose out of the same criminal transaction, all were charged with conspiracy, and the interest of justice would not have been served by requiring the expensive and time-consuming duplication of evidence at separate trials. *Presbury, supra*, *Jones, supra*. Furthermore, "both the United States Supreme Court and the [Pennsylvania Supreme Court] have struck down [a] challenge to the constitutionality of 'death qualified' juries, and held the death qualification process is consistent with the guarantees of a trial." *Commonwealth v. Marinelli*, 547 Pa. 294, __ 690 A.2d 203, 216 (1997). *See Lockhart v. McCree*, 476 U.S. 162 (1986); *Commonwealth v. Lambert*, 529 Pa. 320, 603 A.2d 568 (1992).

[8] Trice and Womack also claim that severance should have been permitted due to the introduction of inculpatory statements made by non-testifying co-defendants. Specifically, statements made by Womack and Finney were introduced into evidence at trial. These statements, however, were redacted to remove any reference to the other defendants in the case. The trial court instructed the jury on more than one occasion that such statements could only be considered as evidence against the defendants who made them. Trice claims that redaction of Womack's and Finney's statements was not an adequate remedy, and, instead, severance should have been granted. Womack sets forth the same argument regarding the confession of Finney. The denial of their severance requests,

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[6] Notably, the jury did not return a verdict of death against co-defendant Jenkins.

appellants claim, denied them their right to confrontation as set forth in *Bruton v. United States*, 391 U.S. 123 (1968).[7] We disagree.

In *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996), our supreme court stated:

> [T]he substitution of the letter "X" for a defendant's name does not violate that defendant's *Bruton* rights if a proper limiting instruction is given, as it was in this case. Thus, because [appellant] has failed to demonstrate how being tried with co-defendants unduly prejudiced him, this claim fails.

Id. at __, 681 A.2d at 1300 (citation omitted). *See Commonwealth v. Washington*, __ Pa. __, 692 A.2d 1018 (1997) (same). The inculpatory statement made by Finney did not refer to any other co-defendant by name; it was redacted [9] so that the other cohorts were referred to as "we," "they," etc. Likewise, Womack's statement was redacted to eliminate specific reference to Trice and the others. *See Commonwealth v. Brooks*, 442 Pa. Super. 579, 660 A.2d 609, 613 (1995) (the practice of using pronouns or "other person" for specific names has been approved by our courts). The trial court gave a proper limiting instruction; additionally, the record reveals that the appellants were not unduly prejudiced by the redacted statements. *Miles*, *supra*. Redaction, as opposed to severance, was clearly a legitimate option, especially

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[7] In *Bruton*, it was held that the introduction of a non-testifying co-defendant's confession which explicitly incriminates another defendant deprives that defendant of his constitutional right of confrontation with respect to the non-testifying co-defendant.

considering the preference for joint trials of co-conspirators. *Jones, supra.* The trial court did not abuse its discretion in refusing to grant appellants' severance request.

Appellants next claim it was error for Detective Joseph Walsh to testify that he found Commonwealth witness Demond Jackson to be truthful. Our review of the testimony in question indicates that Detective Walsh was merely responding to questions by defense counsel asking him to explain why Jackson was dismissed as a suspect in the case. Detective Walsh answered that, based upon his investigation, he deemed the information provided by Jackson to be truthful. In any event, the appellants did not suffer prejudice as a result of the detective's comments because the trial court clearly instructed the jury that the detective's testimony was not to be viewed as a comment on Jackson's truthfulness. The law presumes that juries follow a court's instructions. *Commonwealth v. English*, __ Pa. __, 699 A.2d 710 (1997); *Commonwealth v. LaCava*, 542 Pa. 160, 666 A.2d 221 (1995); *Commonwealth v. Baker*, 531 Pa. [10] 541, 614 A.2d 663 (1992). Detective Walsh's remarks could not have affected the outcome of the appellants' trial.

Appellants next assert that Officer Mitchell McKeever's testimony regarding another crime implicated the appellants in criminal activity unrelated to the crimes for which they were being tried. Specifically, the prosecutor asked Officer McKeever if he had arrested co-defendant Jenkins after observing him with a gun at the Ace Check Cashing Agency. The appellants claim that this question violated the trial court's ruling with regard to

the robbery at the check cashing agency, i.e., that it was not evidence of a signature crime. First, we note that there was no objection made by appellants when the prosecutor asked the question of which they now complain. A party must make a timely and specific objection at trial in order to preserve an issue for review; this court will not consider a claim which was not called to the trial court's attention at the time an error was committed. *Commonwealth v. Montalvo*, 434 Pa. Super. 14, 641 A.2d 1176 (1994). In any event, the testimony complained of did not implicate the appellants in the unrelated criminal activity. No reference was made to the robbery and the testimony regarding Jenkins' arrest was directly related to his possession of the gun that was later determined to have been the murder weapon to the instant case. No relief is due.

Appellants next claim that the prosecutor, during closing arguments, pointed at them and the other co-defendants and said that the confessions of their non-testifying co-defendants corroborated their guilt. Consistent with the manner in which the confessions/statements were redacted, the prosecutor did not [11] mention names in her comments at issue; rather, she used the words "others," "other people," and "they." *See Washington*, *supra* (prosecutor's use of the word "they" while discussing a co-defendant's confession was insufficient to prejudice the jury against appellant); *Brooks*, *supra* (the practice of substituting pronouns or "other person" for specific names has been approved by our courts). Moreover, any alleged harm was alleviated by the cautionary instructions given by the trial court. It is presumed

that the jury followed this instruction. *English*, *supra*; *LaCava*, *supra*; *Baker*, *supra*.

Finally, Trice and Womack claim that the trial court erred in admitting evidence of a separate robbery committed by them and two of their co-defendants at the Ace Check Cashing Agency three days after the Lilly's Market robbery and murder. The trial court specifically excluded any reference to the fact that appellants committed a robbery at the Ace Check Cashing, rather, the court allowed the evidence to be permitted only for the very limited purpose of linking the co-defendants and their access to the murder weapon and car used to commit the crimes at Lilly's Market. Admissibility of evidence is a matter addressed to the sound discretion of the trial court; an appellate court may only reverse such a ruling upon a showing that the trial court abused that discretion. *Commonwealth v. Smith*, __ Pa. __ 694 A.2d 1086 (1997); *Commonwealth v. Bronshtein*, 547 Pa. 460, 691 A.2d 907 (1997). In making a decision as to whether certain evidence should be admitted, the trial court is required to weigh the relevance and probative value of such evidence against its prejudicial impact *Commonwealth v.* [12] *Rollins*, 525 Pa. 335, 580 A.2 744 (1990). The appellants have not established that the trial court abused its discretion.

Judgments of sentence affirmed.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RECEIVED
DEC 26 1997
SUPREME COURT
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Respondent

v.

JARMAINE Q. TRICE,

Petitioner

NO. E.D. ALLOCATUR DKT. 1997

APPEALS UNIT
DEC 26 1997

PETITION FOR ALLOWANCE OF APPEAL

FROM AN ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA ENTERED DECEMBER 16, 1997, AT NO. 01829 PHILADELPHIA 1996, AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION, OF PHILADELPHIA COUNTY, AT JUNE TERM, 1995, NO. 0118.

JOEL S. MOLDOVSKY, ESQUIRE
Identification No. 04118
Attorney for Petitioner

MOLDOVKSY & MOLDOVSKY
1207 Chestnut Street
Fifth Floor
Philadelphia, PA 19107
(215) 575-0400

* * * * *

[1] ORDER FOR WHICH REVIEW IS SOUGHT

Judgments of Sentence were imposed on May 13, 1996, by the Honorable John J. Poserina, Jr., Judge of the Court of Common Pleas for the First Judicial District of Pennsylvania. Judgments were issued on counts in Bill 118, June Term, 1995, subsequent to a jury verdict of guilty on five counts in said Bill. Petitioner's notice of appeal to the Superior Court was filed timely on May 22, 1996. In a Memorandum Opinion dated December 16, 1997, the Superior Court of Pennsylvania ruled as follows:

> *ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby AFFIRMED.*

The Trial Court and Superior Court Opinions are included in the Appendix to this Petition.

[2] QUESTIONS FOR REVIEW

I. Is meaningful appellate review possible herein where the trial notes of testimony of the most questionable of witnesses, and the only one who inculpated petitioner, have been lost?

(Answered by the lower court that it deemed this issue waived.)

II. In light of the police and prosecutorial misconduct herein, polluting the redaction of the co-defendants' statements, along with the fact that a co-defendant was subject to the death penalty, although petitioner was not, should a severance have been granted?

(Answered in the negative by the lower court.)

III. Under all of the circumstances of this case, was it error for the trial judge to admit evidence of a separate attempted robbery, which he had ruled was not a signature crime?

(Answered in the negative by the lower court.)

[3] STATEMENT OF THE CASE

This Petition seeks allowance of appeal from the Superior Court's affirmance of the judgments of sentence imposed by the Philadelphia Court of Common Pleas on May 13, 1996.

Procedural History

Petitioner, Jarmaine Q. Trice, was charged in June Term 1995, Bill No. 118, counts one to twenty, with second degree murder, robbery, conspiracy and related offenses, having been arrested on March 7, 1995 (N.T. 3/6/96 31). The charges arose out of an incident that occurred on December 11, 1993, during which Lilly's Market, located at 3122 West York Street in Philadelphia, Pennsylvania, was robbed and Francisco Azcona was fatally shot.

On July 25, 1995, a motion pursuant to Pennsylvania Rule of Criminal Procedure 1128 was filed seeking severance of petitioner's trial from his co-defendants. The Homicide Calendar Judge, the Honorable Carolyn Engel Temin, held hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion. However, she redacted the co-defendants' statements for trial and ruled that the trial judge should resolve any further problem. The motion was renewed during jury

selection on February 12, 13, and 14, 1996, as well as during trial on March 5, 1996 (N.T. 3/5/96 81-2). [4]

Petitioner entered pleas of not guilty on the charges and proceeded to trial by jury, along with four co-defendants. One of the co-defendants, Julius Jenkins, was charged with first degree murder and subject to the death penalty. This left your petitioner subject to trial by a death qualified jury, where twenty-three potential jurors were lost solely because they could not return a verdict of death although they could vote for a life sentence. Jury selection was completed on February 22, 1996. On that date the last six of the said twenty-three prospective jurors were lost to the prosecutor's challenges for cause because they could not return a death penalty. (N.T. 2/22/96 41.) On March 13, 1996, the jury found petitioner guilty of murder in the second degree, three counts of robbery, and conspiracy.

Sentencing took place on May 13, 1996, and petitioner was sentenced to life for the second degree murder conviction, consecutive five to ten years imprisonment for the robbery of Anna Azcona, and no further penalty was imposed on the two remaining counts of robbery, nor on the conspiracy bill. Notice of appeal then was filed in a timely manner on May 22, 1996, followed by a Statement Of Matters Complained Of On Appeal on June 7, 1996.

The trial notes of testimony from February 29, and March 4, 1996, have been lost by the retired court reporter. All efforts to obtain these volumes of testimony diligently have been made by your petition writer in conjunction with the aid of the trial judge, the Honorable John J. Poserina, Jr., and his staff.

Commonwealth witness, Demond Jackson, testified before the judge and jury on February 29, and March 4, 1996. His was the only testimony to inculpate petitioner at trial. Because these notes have been lost, your petition writer will make reference to his personal trial notes of the testimony of Demond Jackson. [5]

Factual History

The facts of the case as found by the trial court and delineated in its Opinion (Appendix "B" 1-4) are summarized here. On Saturday, December 11, 1993, petitioner, along with four other males, agreed to "get paid," *i.e.*, to rob Lilly's Market at 3122 W. York Street in Philadelphia, Pennsylvania. Demond Jackson was with petitioner and the co-defendants, but declined to enter into the conspiracy. He asked for a ride to "West Philly." He later testified against petitioner and the co-defendants. All six males were in co-defendant Gregory Womack's 1979 Oldsmobile Cutlass Cruiser, a four-door silver color station wagon.

In a series of rapid events, three males, Atil Finney, Julius Jenkins and Jarmaine Trice, petitioner herein, entered the store. Three remained in the car. Jenkins and petitioner went to the counter with the cash register where Anna Azcona and Andrea Rodriguez were. However, petitioner was not identified by any witness in the store. The decedent, Francisco Azcona, was also behind the counter, but he was stocking shelves and was not immediately visible from the counter. Jenkins announced a hold-up and demanded cash. The decedent stood up and was shot and killed by Jenkins. Ballistic evidence demonstrated that the decedent was killed with a .44 caliber bullet

shot from a .45 revolver. The witnesses, Anna Azcona and Andrea Rodriguez, identified Jenkins as the person who shot the decedent. Petitioner grabbed the cash register and all three individuals left the store and returned to the automobile.

Three days after the homicide, in a separate incident occurring in the vicinity of the Ace Check Cashing store located at 29th and York, petitioner and three co-defendants were arrested. Near the location where they were arrested, a .45 caliber [6] hand gun was recovered. Although the trial court ruled that the separate robbery at Ace Check Cashing was inadmissible as a signature crime, the testimony surrounding the recovery of the weapon in the presence of these same individuals was allowed to establish that these males knew each other, used the same car, and had access to a gun. Police Officer Mitchell McKeever observed the males at Ace Check Cashing and attempted to stop the car. Other police, who arrived later, recovered at .45 caliber revolver near the location. Ballistics made a comparison of the bullet recovered from the body of the deceased with the gun recovered near Ace Check Cashing and determined that it was used to shoot the deceased, Francisco Azcona.

From this summary of the facts found by the trial judge, it is clear that he rejected the trial testimony of Demond Jackson that four males left the car and committed this crime (lost notes of testimony 2-29-96). In fact, in Jackson's original statement to the police on February 27, 1995, marked as Defense Exhibit 7 on February 29, 1996, on page two, he had stated that petitioner, whom he knew as "Quad," remained in the car along with him and the driver and only three males exited the car; he said that co-defendant Naree

Abdullah, known to him as "Naim," carried the cash register around the corner from the store to where the car was parked. At page 4 of the said statement he identified "Naim's" photo, which was codefendant Naree Abdullah. At page 5 he identified "Quad's" photo as Quhir Wise which is an alias of Jarmaine Q. Trice, petitioner, whose Philadelphia Photo Number is 715289, as noted in the said statement. Petitioner is also known as Eric Greene. At ten different places throughout the entire statement he refers to "Quad" and [7] "Naim" and is consistent that "Quad" remained in the car, and that "Naim" returned with the cash register.

Interestingly, the trial judge disbelieved this witness when he changed his story at trial and said that four men got out of the car and went to the store, because the judge has found that only three had gone to the store. Yet, the trial judge accepted the new story that petitioner went into the store and returned with the cash register, instead of Jackson's original version in his statement that "Quad" (petitioner) never left the car and only three people went to the store. This is amazing because on March 4, 1996 (lost notes of testimony), Jackson testified that the police corrected the mistakes he had made in his statement. He also admitted that he had three pending drug cases, to be prosecuted by the same District Attorney's office as herein, at the time of his first statement about this case. He testified that the police had put these drugs on him. He even admitted that he had lied at a pretrial hearing in order to look good.

He also acknowledged that he knew that he could be charged with this murder, as well as another attempted robbery in which he was shot in the hand.

In Defense Exhibit 8, a police report of December 30, 1993, also introduced on February 29, 1996, Jackson had reported that on December 11, 1993, he had been shot in the hand by robbers who demanded his coat in the 7700 block of Ogontz Avenue, in Philadelphia. He gave specific details about the physical and clothing descriptions of the robbers. At trial, he admitted that the whole story was a fake and that he also had lied to the people at the hospital that night. In Defense Exhibit 7, pages 1 and 3, he related a completely different story. He said that he had gotten [8] shot in the hand at a bar in North Philadelphia at 22nd and Diamond Streets during a robbery that some of his companions committed.

In co-defendant Finney's confession, Commonwealth Exhibit 29, pages 2 and 3 (introduced on March 5, 1996, N.T. 111 and 117), Finney states that he and two others went into the store. On page 7 of his statement he said that he knew everyone in the car and that he did not know Demond Jackson. (N.T. 3/5/96 120.) According to this, Demond Jackson was not in the car at all.

Co-defendant Womack's confession was introduced on March 6, 1996, as Commonwealth Exhibit 32. (N.T. 3/6/96 32 and 38.) He also said that only three people entered the store.

This major contradiction between Demond Jackson's trial testimony that there were four robbers, and the co-defendants' confessions that there were only three, was resolved by the trial judge against Jackson. Jackson had every reason to curry favor with the police, as outlined herein, and would parrot whatever he thought they wanted to hear whenever

they wanted it, whether in a statement or in testimony. This most suspect of witnesses was buttressed impermissibly by the misconduct of the prosecutor and police at trial as explained *infra*. [9]

REASONS FOR ALLOWANCE OF APPEAL

I. Fundamental Fairness, Guaranteed in the United States and Pennsylvania Constitutions, Requires That Petitioner Be Afforded a New Trial Because No Evidence on the Record Inculpates Him, the Trial Notes of Testimony of the Only Witness Who Implicated Him Having Been Lost, and Meaningful Appellate Review of this Most Questionable of Witnesses Is Not Possible, Nor Has This Issue Been Waived Under the Circumstances of this Case.

The notes of testimony from February 29 and March 5, 1996, were not produced. Exhaustive efforts to obtain these volumes of testimony were diligently made by your petition writer in conjunction with the trial judge, the Honorable John J. Poserina, Jr., and his staff. These notes of testimony have been lost. Petitioner respectfully requests that a new trial be granted in this matter, since not granting one would violate his right to due process, equal protection of the law, and thus offend the concept of fundamental fairness, as guaranteed by both the Pennsylvania and Federal Constitutions. Petitioner has no record of the testimony Demond Jackson gave to the judge and jury to cite and contest before Your Honorable Court. Nor can this testimony meaningfully be reconstructed. Since Pa.R.A.P. 1923 provides that the appellant "may" prepare a statement of the missing evidence and submit it to opposing counsel and the trial judge, your

petitioner should not be deemed to have waived any issue regarding this, because this procedure certainly is not mandatory where the missing testimony is that of the most corrupt and tainted of witnesses, who was a self-admitted liar, clearly intent on currying favor with the police and prosecutor, who at anytime could charge him also with murder. His testimony was so muddled, contradictory and unreliable that your petition writer could not foresee [10] any fair reconstruction of it, particularly after reading the trial judge's version of it in his Opinion.

Herein, Commonwealth witness, Mrs. Azcona, did not identify petitioner as one of the robbers, though she did identify co-defendant Jenkins. (See N.T. 2/24/96 pgs. 13-14). The second Commonwealth witness, Ms. Andrea Rodriguez, also did not identify petitioner. (See N.T. 2/27/96 pgs. 71-72). The only testimony, which was highly questionable, specifically implicating petitioner was the testimony of Demond Jackson. This testimony being absent, the record as it stands does not contain any evidence to support petitioner's conviction. Therefore, this conviction can not stand. Any reconstruction under Pennsylvania Rule of Appellate Procedure 1923 would not be the complete and accurate version upon which the jury based its verdict and, therefore, no meaningful appellate review would be possible under all of the circumstances herein.

II. Petitioner Should Have Had His Trial Severed From the Co-Defendants Not Just Because of Their Antagonistic Defenses, Nor Just Because He Was Forced to Trial With a Co-Defendant Subject to the Death Penalty, Though Petitioner Was Not,

But Particularly Because Effective Redaction of the Co-Defendants' Statements, Though Attempted, Was Polluted by the Gross Prosecutorial and Police Misconduct Herein.

On July 25, 1995, a motion was filed seeking severance of petitioner's trial from those of his co-defendants. Hearings were held before the Honorable Carolyn Engel Temin, including hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion, but said that any further problem should be resolved by the trial judge. The motion was renewed during jury selection [11] on February 12, 13, and 14, 1996, as well as during trial on March 5, 1996 (N.T. 3/5/96 81-2).

The learned trial judge, notwithstanding his good intentions, denied petitioner his right to Due Process and Equal Protection of the law under the Federal and State Constitutions. He was subject to trial along with one of the co-defendants, Julius Jenkins, who was charged with a capital crime, and forced to face a jury which had been death qualified and knew that it would be asked to return a death penalty for Jenkins.

The court's denial of petitioner's Motion to Sever was an abuse of discretion that caused severe and substantial prejudice to petitioner. *See Commonwealth v. Katsafans*, 464 A.2d 1270 (Pa. Super. 1983); *Commonwealth v. Dumas*, 445 A.2d 782 (Pa. Super. 1982). Twenty-three potential jurors were lost to petitioner solely because they could not return a verdict of death, although they could return a verdict of life imprisonment. On February 12 through 14, 1996, respectively, 9, 5, and 3 prospective jurors were lost. On each of these dates the motion for severance

was renewed and denied. The final six were lost on February 22,1996. (N.T. 2/22/96 41.) It should be noted that these twenty-three prospective jurors were lost solely for this reason. No challenge is made herein to the loss of any other potential juror.

This violated petitioner's right to a jury of his peers as required by the Sixth Amendment to the United States Constitution and Article I, § 9 of the Pennsylvania Constitution. Petitioner's peers are made up of people both for and against the death penalty. Together, they represent a cross-section of appellant's community. This loss of the said twenty-three prospective jurors also violated petitioner's Due Process and Equal Protection rights. Many needed additional peremptory challenges [12] could have been given here to attempt to diminish this prejudice to petitioner. Though requested, this was not done. Herein, petitioner and each of the non-capital co-defendants each got two peremptory challenges. Your petition writer, after argument, was given two more, for a total of four. All four were exhausted by him and no additional ones were allowed.

The learned trial judge, in his Opinion (Appendix "B" 5-7), dwells on the courts having held that a death qualified jury is not conviction prone. Petitioner is not happy with this state of the law, and objected to it. However, petitioner additionally argues that he is entitled to a jury of his peers including those against the death penalty, but who could vote for life imprisonment. Since this was not a capital proceeding as far as petitioner was concerned, he should not have been joined in a trial where the Commonwealth could challenge for cause those who could not vote for a sentence of death. There was no consideration of the

death penalty for petitioner and, therefore, the prosecutor's challenge for cause of those prospective jurors against the death penalty, as this related to petitioner, constituted a violation of petitioner's rights to Due Process and Equal Protection of the law. Therefore, the Opinions of the lower courts are inapropos. Accordingly, severance should have been granted and petitioner should not have been tried with the capital codefendant. Petitioner humbly submits that separate trials were required to protect his constitutional rights. Therefore, a new trial should be granted, wherein petitioner would not be tried along with the capital co-defendant, because jury selection for one is different from the other.

In *Bruton v. United States*, 391 U.S. 123 (1968), the United States Supreme Court held that the introduction into evidence at a joint trial of the out-of-court [13] statement of a co-defendant, who is not subject to cross-examination, is a denial of a defendant's Sixth Amendment right to confrontation.

Pursuant to *Bruton*, petitioner's trial should have been severed from the trial of the co-defendants. The statements made by the co-defendants, which implicate petitioner, were used by the Commonwealth in a joint trial to his irrevocable prejudice. It was alleged, in suppression motions, that the statements obtained by the police from the co-defendants were involuntary and, therefore, unlawful. The evidence offered against the co-defendants, none of whom testified, was inconsistent, harmful and prejudicial to petitioner, who did not confess, pled not guilty, and did not testify. As detailed *infra*, the prosecutor unlawfully turned their confessions into constructive "testimony" by them against petitioner.

In the case before this Honorable Court, the statements of the co-defendants are inextricably interlocked. The petitioner gave no statement. The jury instructions only to consider the confessions against those who gave them apparently were disregarded in light of the most contradictory testimony of the most suspicious of witnesses, Demond Jackson, who gave the sole testimony implicating petitioner.

Where redaction is impossible or would prejudice the defendant, the court either must grant a defense motion to sever or forbid any use of the confessions. *Commonwealth ex rel. Berkery v. Myers*, 429 Pa. 378, n. 4, 239 A.2d 805, n. 4 (1968). After all, it is the Commonwealth which sought the joint trial. Either of these options would have been sufficient herein, but neither was ordered by the lower court, resulting in substantial and irreparable harm to petitioner. Accordingly, it was an abuse of discretion that severance was not granted herein and petitioner [14] should have been tried separately to afford him his state and federal constitutional rights.

A. Officer Mitchell McKeever Violated the Judge's Instruction Limiting His Testimony about a Separate Attempted Robbery, When He Testified That a Co-Defendant Herein, in That Incident Pointed a Gun at Him and Pulled the Trigger.

The learned trial judge correctly ruled that the Ace Check Cashing robbery was not a signature crime, but allowed limited evidence in from that event to show acquaintanceship, access to a gun, and similarity of the car. (Appendix "B" 8.) This was done after

argument (out of the jury's presence) on a motion *in limine* brought by your petition writer. (N.T. 3/5/96 4-12.) This ruling was erroneous, constituting an abuse of discretion, since the probative value of this evidence was substantially outweighed by its prejudicial effect. However, the trial court took great pains to ensure that his ruling was properly executed by the Assistant District Attorney and her witness, Officer Mitchell McKeever. (N. T. 3/5/96 12 and 20.) Though the prosecutor reported to the trial judge that she confirmed all of this with the said officer, he nonetheless went on to testify impermissibly that a co-defendant had pointed a gun at him and pulled the trigger. *Id.*

Assuming *arguendo*, that admission of this evidence, as circumscribed by the lower court, was proper, the ruling was violated, resulting in substantial irreparable prejudice to petitioner. This would not have happened had petitioner's trial been severed, since testimony regarding the details of the co-defendants' activities at the other attempted robbery would not have been elicited by their lawyers. However, there was no severance, and Officer Mckeever destroyed the integrity of the lower [15] court's ruling when he testified as follows under cross-examination by Mr. Ibrahim, counsel for Jenkins (N.T. 3/5/96 78):

> Q. And the next time you saw the gun was when it was five feet away from him, correct?
>
> A. No, when he pointed the gun at me and pulled the trigger and when his hand jerked.

This misconduct and contempt clearly pained the learned trial judge, whose instructions so flagrantly

had been violated. Nonetheless, when outside the presence of the jury, your petition writer renewed his motion for severance and also moved for a mistrial, neither of which was granted. (N.T. 3/5/96 82-4.) The trial court was adamant that no evidence of another crime, the attempted robbery, was to come in, yet Officer McKeever's testimony made out the crime of attempted murder or aggravated assault on a police officer. This was clearly a violation of both the letter and the spirit of the trial judge's order.

Petitioner urges that Officer McKeever's response, quoted above, constituted police and prosecutorial misconduct, after the trial judge gave explicit instruction to prevent any such testimony, and twice instructed the Assistant District Attorney to convey these limitations to the officer. (N.T. 3/5/96 12 and 20.) The law is clear that a prosecutor must not convey to the jury either expressly or by reasonable implication any act of prior criminal activity attributable to the defendant. *Commonwealth v. Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982). Notwithstanding this rule, the Assistant District Attorney elicited from Commonwealth witness Officer McKeever that an arrest was made in relation to the Ace Check Cashing incident. (N.T., 3/5/96 72.) Hence, this incident clearly became [16] a crime, which the trial judge had tried to insulate against so that the jury would not be inflamed against petitioner and his co-defendants.

It is a principle of long standing in this Commonwealth that evidence of a distinct crime, except under special circumstances, in inadmissible against a defendant who is being tried for another crime because the commission of one crime is not proof of the commission of the other, and the effect of such

evidence is to create prejudice in the jury's mind. *Commonwealth v. Fortune*, 464 Pa. 367, 373, 346 A.2d 783 (1975); *Commonwealth v. Wable*, 382 Pa. 80, 84, 114 A.2d 335, 336 (1955); *Commonwealth v. Morris*, 493 Pa. 164, 175, 425 A.2d 715, 720 (1981); *Commonwealth v. Bryant*, 575 Pa. 473, 530 A.2d 83 (1987).

B. In Violation of the Trial Judge's Instruction to the Prosecutor Not to Elicit Testimony of Another Crime, She Asked Officer Mitchell McKeever if He Had Arrested a Co-Defendant for a Separate Attempted Robbery.

Prosecutorial misconduct denied petitioner a fair trial. The Assistant District Attorney also violated the lower court's order with her direct questioning of Officer McKeever. During direct examination, she improperly asked Officer McKeever if he had effected an arrest in the Ace Check Cashing incident. (N.T. 3/5/96 72.) This questioning constituted impermissible prosecutorial misconduct. As just discussed, she violated the court's Order. The law is clear that a prosecutor must not convey to the jury either expressly or by reasonable implication any act of prior criminal activity. *Purcell*, 499 Pa. 589, 592, 454 A.2d 542, 544 (1982). Notwithstanding this, the prosecutor elicited from Commonwealth witness Officer McKeever that petitioner and three of his co-defendants were involved in the Ace Check Cashing incident which led to an arrest. (N.T. 3/5/96 72.) This corrupted the purpose for [17] which the trial judge had permitted limited testimony and instead prejudiced petitioner impermissibly by invoking activities of himself and his co-defendants which constituted another crime.

It is the burden of the Commonwealth to establish that its misconduct did not affect the outcome of the trial. *Commonwealth v. Bricker*, 506 Pa. 571, 589-91, 487 A.2d 346, 355 (1985). The Pennsylvania Supreme Court has outlined the reviewing court's inquiry:

> We must first be able to declare a belief that the error was harmless beyond a reasonable doubt before it will be held harmless and a judgment of sentence affirmed. Furthermore, the burden of establishing that the error was harmless beyond a reasonable doubt must be borne by the prosecution. Applying this two part analysis in *Davis* we said that if there is a reasonable possibility that the error "Might have moved 'the minds of an average jury' toward conviction . . ." the error cannot be held harmless.

Commonwealth v. Collins, 462 Pa. 495, 503, 341 A.2d 592, 495 (1975) (quoting *Commonwealth v. Davis*, 452 Pa. 171, 177, 305 A.2d 715, 719 (1973)).

In the instant matter, the lower court took great effort to redact statements of co-defendants and protect the integrity of its evidentiary rulings and gave limiting or cautionary instructions to the jury. This was not enough to overcome the prejudice suffered by petitioner and there was no overwhelming evidence herein to moot this prejudice. An examination of the record discloses a prosecutorial strategy rooted in gaining the admission of unlawful evidence and harassment of the defense through persistent and improper suggestion. Because of the extent and specificity of the lower court's evidentiary rulings, the prosecutor's actions in this case must be considered as intentional and in bad faith. [18]

C. Detective Joseph Walsh Impermissibly Twice Testified That He Determined That the Only Witness Who Inculpated Petitioner Was Truthful.

Just as a prosecutor may not give her personal opinion about a defendant's credibility, *Commonwealth v. Brawner*, 381 Pa. Super. 265, 553 A.2d 458 (1989), neither may a homicide detective give his personal opinion about the truthfulness of a witness, especially when that witness, Demond Jackson, is the whole case against petitioner. This is because a homicide detective is a public official, who wears a special mantle of importance and credibility. Your Honorable Court made this clear in *Commonwealth v. Russell*, 456 Pa. 559, 322 A.2d 127 (1974) where a former prosecutor had opined that he had "no doubt" of the defendant's guilt after reviewing the evidence. In *Russell*, it was held that such a witness "in effect, expressed his opinion that an the defense witnesses were lying, and in this case the credibility of the witnesses was the crucial determination the jury had to make. Where the ultimate issues in the case rest upon a resolution of such conflicting testimony as the jury was faced with instantly, we have no alternative but to hold this is reversible error." *Russell*, 456 Pa. at 565, 322 A.2d at 130. *Russell* only involved a former prosecutor. Herein, Detective Walsh is a current official, making his pronouncement even more impressionable upon the jury and, therefore, more objectionable than what occurred in *Russell*, where a conviction for the murder of a police officer was reversed.

It was reversible error for Detective Walsh to tell the jury his personal belief as to the truth or falsity of

the evidence, specifically the credibility of Commonwealth witness Demond Jackson. This conduct by the detective was in the nature of prosecutorial misconduct, the detective being the agent of the prosecutor. The [19] detective's testimony that he believed that Jackson was truthful (N.T. 3/6/96 88 and 97) caused extreme and irreparable prejudice to petitioner, since Jackson, whose testimony was contradictory and who was completely impeached by defense counsel, was the only Commonwealth witness to inculpate petitioner. The detective made this impermissible statement twice. *Id.* The trial judge disapproved of the detective giving his opinion. (N.T. 3/6/96 97-98.) Yet, the detective did it again. This certainly made an indelible impression on the jury, which could not be set aside notwithstanding the best of curative instructions given with the best of intentions. On both occasions, a mistrial was requested and improperly denied. (N.T. 3/6/96 91-2 and 98.) Therefore, petitioner's conviction can not stand. As a result of this severe prejudice, only a new trial will satisfy the constitutional guarantee of justice for all. Any harmless error analysis will reveal that this conviction is not supported by such overwhelming evidence which would make this harmless error.

It should be noted that Detective Walsh's impermissible testimony occurred during the cross-examination by co-defendant Atil Finney's counsel and again impermissibly during co-defendant Naree Abdullah's counsel's cross-examination. (N.T. 3/6/96 87-88 and 97.) Detective Walsh's testimony was unresponsive to the actual questions posed. However, had a severance been granted, this would not have happened, because your petition writer cross-examined

in such a way that did not give the detective any opportunity to taint this trial with his prohibited personal opinions about the truthfulness of Demond Jackson.

D. Violating Redaction, Where Neither the Petitioner Nor the Co-Defendants Testified, the Prosecutor in Her Summation Argued That the Confessions of Two Co-Defendants Corroborated That They [20] Committed This Crime With the Others as She Gestured Toward Petitioner and His Co-Defendants.

The lower court had made a great effort to redact statements of co-defendants and protect the integrity of its evidentiary rulings with limitations on counsel and cautionary instructions to the jury. An examination of the record discloses a prosecutorial strategy rooted in gaining the admission of unlawful evidence and harassment of the defense through persistent and improper suggestion. Because of the extent and specificity of the lower court's evidentiary rulings, the prosecutor's actions in this case must be considered as intentional and in bad faith.

The prosecutor is not permitted during closing argument to argue facts not proved, distort the law, misstate evidence, express a personal opinion as to the credibility of defense witnesses and trial strategy. *Commonwealth v. Pfaff*, 477 Pa. 461, 384 A.2d 1179 (1978); *Commonwealth v. Henry*, 5 Pa. Super. 47, 440 A.2d 1215 (1982); *Commonwealth v. Bullock*, 266 Pa. Super. 526, 405 A.2d 943 (1979).

Instantly, the prejudicial remarks and gestures permeating the prosecutor's closing argument so exceeded these bounds of propriety that petitioner was

denied a fair trial. In her closing argument, the prosecutor made the petitioner's defense antagonistic to that of his co-defendants whose confessions were admitted – Finney and Womack. Petitioner's defense was to plead not guilty, rely on his presumption of innocence, not testify, and require the Commonwealth to prove his guilt beyond a reasonable doubt. These rights were denied him when Assistant District Attorney Ruiz pointed at him and his co-defendants and said that the co-defendants' confessions corroborated that they did this crime with the others, including petitioner. The defense request for a mistrial was denied. (N.T. 3/8/96 64-68.) [21]

This violated the purpose of the redaction and added additional prejudice resulting from the lower court's failure to grant the severance motion. Prosecutorial misconduct aborted justice. The prosecutor's pointing at petitioner turned the co-defendants' confessions into constructive antagonistic "testimony" against him. This resulted in severe prejudice, which would have been avoided by severance of petitioner's case. *See Commonwealth v. Marinelli*, 547 Pa. 294, 690 A.2d 203 (1997).

III. Under the Circumstances of this Case, it was Error for the Trial Judge to Admit Evidence of a Separate Attempted Robbery, Which He Had Ruled Was Not a Signature Crime.

It was error for the learned trial judge to admit evidence which tended to show another robbery or attempted robbery that petitioner and some of the other co-defendants allegedly committed. Because a severance was not granted, this error was compounded when Officer Mitchell McKeever violated the judge's

instructions to the prosecutor limiting his testimony. By testifying that co-defendant Julius Jenkins pointed a gun at him and pulled the trigger, this witness, in effect, established that on another occasion petitioner and his companions committed an attempted murder of the officer.

Prejudice results where the testimony conveys to the jury either expressly, or by reasonable implication, the fact of another criminal offense. *Commonwealth v. Riggins*, 478 Pa. 222, 386 A.2d 520 (1978); *Commonwealth v. Banks*, 454 Pa. 401, 311 A.2d 576 (1987). The inference of past criminal conduct is unmistakable here and far beyond that which the trial judge intended to allow into evidence. The references were clearly improper, causing severe and irreparable prejudice to petitioner. This is especially true because the particular activity testified to by Officer McKeever [22] suggests a murderous disposition, severely prejudicing petitioner in light of the instant murder charge against him.

A prosecutor may not introduce evidence of other criminal acts of the accused, unless the evidence is substantially relevant for some purpose other than showing a probability that he committed the crime for which he is on trial, because he is a man of criminal character. *McCormick on Evidence*, § 190 at 447 (2d ed. 1972); *See Commonwealth v. Crawley*, 514 Pa. 539, 526 A.2d 334, 343 (1987). By the lower court's own rulings, limiting the facts of the Ace Check Cashing incident that could be elicited, there was no signature crime here. (Appendix "B.") The trial judge tried to take a middle ground, allowing in some facts from the other incident, but excluding others. This was a dangerous path that unavoidably led to the jury

receiving testimony on facts the judge intended to be excluded. The prejudice was both predictable and did actually occur. As a result petitioner must be afforded a new trial.

Petitioner prays that Your Honorable Court will allow an appeal.

Respectfully submitted,
/S/ Joel S. Modlovsky
JOEL S. MOLDOVSKY, ESQUIRE
Attorney for Petitioner

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent, v. JARMAINE Q. TRICE, Petitioner.	No. 650 E.D. Alloc. Dkt. 1997 Petition for Allowance of Appeal from Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 14th day of August 1998, the Petition for Allowance of Appeal is granted, limited to the issue of whether the common pleas court erred by denying the motion for severance thereby resulting in the violation of Petitioner's Sixth Amendment right of confrontation upon the admission of statements given by his nontestifying codefendants.

TRUE COPY FROM RECORD
Attest: AUG 14 1998
Patricia Johnson
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,

Appellee

v.

JARMAINE Q. TRICE,

Appellant.

NO. 0031

E.D. APPEAL DKT. 1998

APPEALS UNIT
Oct 28 1998

BRIEF FOR APPELLANT

FROM AN ORDER OF THE SUPERIOR COURT OF PENNSYLVANIA ENTERED DECEMBER 16, 1997, AT NO. 01829 PHILADELPHIA 1996, AFFIRMING THE JUDGMENT OF SENTENCE OF THE COURT OF COMMON PLEAS, CRIMINAL TRIAL DIVISION, OF PHILADELPHIA COUNTY, AT JUNE TERM, 1995, NO. 0118.

JOEL S. MOLDOVSKY, ESQUIRE
Identification No. 04118
Court-appointed
Attorney for Appellant

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Fifth Floor
Philadelphia, PA 19107
(215) 575-0400

* * * * *

[1]

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to:

(a) 42 Pa.C.S.A. 724, and 5105 (allowance of appeal from the Superior Court of Pennsylvania); and

(b) Your Honorable Court's Order of August 14, 1998, allowing this appeal.

[2]

ORDER IN QUESTION

Judgments of Sentence were imposed on May 13, 1996, by the Honorable John J. Poserina, Jr., Judge of the Court of Common Pleas for the First Judicial District of Pennsylvania. Judgments were issued on counts in Bill 118, June Term, 1995, subsequent to a jury verdict of guilty on five counts in said Bill. Appellant's notice of appeal to the Superior Court was filed timely on May 22, 1996. In a Memorandum Opinion dated December 16, 1997, the Superior Court of Pennsylvania ruled as follows:

> *ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby AFFIRMED.*

The Trial and Superior Court Opinions are included in the Appendixes herein. [3]

STATEMENT OF THE QUESTION INVOLVED

Should appellant have been granted a severance from his codefendants?

(Answered in the negative by the lower court) [4]

STATEMENT OF THE CASE

Your Honorable Court has granted this allowance of appeal from the Superior Court's affirmance of the judgments of sentence imposed by the Philadelphia Court of Common Pleas on May 13, 1996, limited to the issue of whether denial of the defense severance motion resulted in a violation of appellant's right of confrontation when the statements of his nontestifying codefendants were introduced in their joint trial.

Procedural History

Appellant, Jarmaine Q. Trice, was charged in June Term 1995, Bill No. 118, counts one to twenty, with second degree murder, robbery, conspiracy and related offenses, having been arrested on March 7, 1995 (N.T. 3/6/96 31). The charges arose out of an incident that occurred on December 11, 1993, during which Lilly's Market, located at 3122 West York Street in Philadelphia, Pennsylvania, was robbed and Francisco Azcona was fatally shot.

On July 25, 1995, a motion pursuant to Pennsylvania Rule of Criminal Procedure 1128 was filed seeking severance of appellant's trial from his four codefendants. The Homicide Calendar Judge, the Honorable Carolyn Engel Temin, held hearings on August 14, 1995, October 2, 1995, and November 13, 1995, when she denied said motion. She redacted the codefendants' statements for trial by referring to them

as "guys" and allowing the number of "guys" to be told to the jury. So that if "two guys" were in the car and "three guys" went in to the store or "two guys" remained on one side of the counter, the jury was so told. Severance again was denied during jury selection before the Honorable John J. [5] Poserina, Jr., on February 12 (N.T. 2/12/96 57), 13 (N.T. 2/13/96 54), and 14 (N.T. 2/14/96 22), 1996, as well as during trial on March 5, 1996 (N.T. 3/5/96 81-2, 86).

Appellant entered pleas of not guilty on the charges and proceeded to trial by jury, along with four codefendants. One of the codefendants, Julius Jenkins, was charged with first degree murder and subject to the death penalty. This left your appellant subject to trial by a death qualified jury, where twenty-three potential jurors were lost solely because they could not return a verdict of death although they could vote for a life sentence. Jury selection was completed on February 22, 1996. On that date the last six of the said twenty-three prospective jurors were lost to the prosecutor's challenges for cause because they could not return a death penalty. (N.T. 2/22/96 41.) On March 13, 1996, the jury found appellant guilty of murder in the second degree, three counts of robbery, and conspiracy.

Sentencing took place on May 13, 1996, and appellant was sentenced to life for the second degree murder conviction, consecutive five to ten years imprisonment for the robbery of Anna Azcona, and no further penalty was imposed on the two remaining counts of robbery, nor on the conspiracy bill. Notice of appeal then was filed in a timely manner on May 22, 1996, followed by a Statement of Matters Complained Of On Appeal on June 7, 1996.

The trial notes of testimony from February 29, and March 4, 1996, have been lost by the retired court reporter. All efforts to obtain these volumes of testimony diligently have been made to your brief writer in conjunction with the aid of the trial judge, the Honorable John J. Poserina, Jr., and his staff. Commonwealth witness, Demond Jackson, testified before the judge and jury on February 29, and March 4, 1996. His was the only testimony to inculpate appellant at trial. The Commonwealth has agreed that these notes have been lost. [6]

Factual History

The facts of the case as found by the trial court and delineated in its Opinion (Appendix "B" 1-4) are summarized here. On Saturday, December 11, 1993, appellant, along with four other males, agreed to "get paid," *i.e.*, to rob Lilly's Market at 3122 W. York Street in Philadelphia, Pennsylvania. Demond Jackson was with appellant and the codefendants, but declined to enter into the conspiracy. He asked for a ride to "West Philly." He later testified against appellant and the codefendants. All six males were in co-defendant Gregory Womack's 1979 Oldsmobile Cutlass Cruiser, a four-door silver color station wagon.

In a series of rapid events, three males, Atil Finney, Julius Jenkins and Jarmaine Trice, appellant herein, entered the store. Three remained in the car. Jenkins and appellant went to the counter with the cash register where Anna Azcona and Andrea Rodriguez were. However, appellant was not identified by any witness in the store. The decedent, Francisco Azcona, was also behind the counter, but he was stocking shelves and was not immediately visible from

the counter. Jenkins announced a hold-up and demanded cash. The decedent stood up and was shot and killed by Jenkins. Ballistic evidence demonstrated that the decedent was killed with a .44 caliber bullet shot from a .45 revolver. The witnesses, Anna Azcona and Andrea Rodriguez, identified Jenkins as the person who shot the decedent. Appellant grabbed the cash register and all three individuals left the store and returned to the automobile.

From this summary of the facts found by the trial judge, it is clear that he rejected the trial testimony of Demond Jackson that four males left the car and committed this crime (lost notes of testimony 2-29-96). In fact, in Jackson's original statement to the police on [7] February 27, 1995, marked as Defense Exhibit 7 on February 29, 1996, on page two, he had stated that appellant, whom he knew as "Quad," remained in the car along with him and the driver and only three males exited the car; he said that codefendant Naree Abdullah, known to him as "Naim," carried the cash register around the corner from the store to where the car was parked. At page 4 of the said statement he identified "Naim's" photo, which was co-defendant Naree Abdullah. At page 5 he identified "Quad's" photo as Quhir Wise which is an alias of Jannaine Q. Trice, appellant, whose Philadelphia Photo Number is 715289, as noted in the said statement. Appellant is also known as Eric Greene. At ten different places throughout the entire statement he refers to "Quad" and "Naim" and is consistent that "Quad" remained in the car, and that "Naim" returned with the cash register.

Interestingly, the trial judge disbelieved this witness when he changed his story at trial and said

that four men got out of the car and went to the store, because the judge has found that only three had gone to the store. Yet, the trial judge accepted the new story that appellant went into the store and returned with the cash register, instead of Jackson's original version in his statement that "Quad" (appellant) never left the car and only three people went to the store. This is amazing because on March 4, 1996 (lost notes of testimony), Jackson testified that the police corrected the mistakes he had made in his statement. He also admitted that he had three pending drug cases, to be prosecuted by the same District Attorney's office as herein, at the time of his first statement about this case. He testified that the police had put these drugs on him. He even admitted that he had lied at a pretrial hearing in order to look good.

He also acknowledged that he knew that he could be charged with this murder, as well as another attempted robbery in which he was shot in the hand. In Defense Exhibit 8, a [8] police report of December 30, 1993, also introduced on February 29, 1996, Jackson had reported that on December 11, 1993, he had been shot in the hand by robbers who demanded his coat in the 7700 block of Ogontz Avenue, in Philadelphia. He gave specific details about the physical and clothing descriptions of the robbers. At trial, he admitted that the whole story was a fake and that he also had lied to the people at the hospital that night. In Defense Exhibit 7, pages 1 and 3, he related a completely different story. He said that he had gotten shot in the hand at a bar in North Philadelphia at 22nd and Diamond Streets during a robbery that some of his companions committed.

In codefendant Finney's confession, Commonwealth Exhibit 29, pages 2 and 3 (introduced on March 5, 1996, N.T. 111 and 117), Finney states that he and two others went into the store. On page 7 of his statement he said that he knew everyone in the car and that he did not know Demond Jackson. (N.T. 3/5/96 120.) According to this, Demond Jackson was not in the car at all. On page 4, he says that he has known one of these "guys" all of his life and "the other 3 about 7 years." (*Id.* at 118.)

Codefendant Womack's confession was introduced on March 6, 1996, as Commonwealth Exhibit 32. (N.T. 3/6/96 32 and 38.) He also said that only three people entered the store, while he and "another guy" waited in the car. (*Id.* at 38.)

This major contradiction between Demond Jackson's trial testimony that four robbers entered the store, and the codefendants' confessions that there were only three, was resolved by the trial judge against Jackson. Jackson had every reason to curry favor with the police, as outlined herein, and would parrot whatever he thought they wanted to hear whenever they wanted it, whether in a statement or in testimony. [9]

The above facts have been recited so that Your Honorable Court will see that there is no overwhelming evidence of guilt which some prior decisions have held would make an erroneous denial of severance only harmless error. Herein, given the lost trial notes of testimony of the only witness, Demond Jackson, who inculpated appellant, there is not one word of evidence on the record to sustain this conviction. Even with Demond Jackson, the most

suspect of witnesses, and without any confession by appellant, there certainly is not overwhelming evidence of his guilt. In fact, the evidence is quite paltry. [10]

SUMMARY OF ARGUMENT

The redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster. The redaction merely deletes appellant's name, not his existence nor that of his codefendants, nor their number, nor their relationship, thus leaving every indication of redaction. With five codefendants sitting together before the jury, it was corroborative of the Commonwealth's position that these five were the "guys" in the redacted confessions introduced at trial. The further specificity that "two guys" did this and "three guys" did that made this impossible for the jury to ignore. And when the prosecutor outrageously argued in summation to the jury that the said confessions proved that all the codefendants committed the crime together, as she gestured at the defense table, appellant's fate was sealed. Redaction instead of severance had tempted the prosecutor to corrupt its purpose, and she could not resist. This doomed appellant, whose inalienable right of confrontation, secured in the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, was denied him.

The record before your Honorable Court does not contain one word incriminating appellant. That is because the trial notes of testimony of the only witness, Demond Jackson, who implicated him, have been lost. This witness had three open drug cases to be

prosecuted by the same District Attorney's office as the instant case. He gave contradictory statements on many matters. He admitted to lying about many matters. He also acknowledged that he knew that he could be charged with the instant murder and another attempted robbery in which he was shot in the hand. He testified that the police put the drugs on him in his case, and that the detectives corrected the mistakes he made in his statement about the instant case.

[11] Appellate review may allow some trial errors to be deemed insignificant where there is overwhelming evidence of guilt. Herein, such is not the case. Not at all. No victim identified appellant, who gave no confession, and no scientific evidence placed him at the scene.

Pretrial severance should have been granted. It also should have been granted when raised anew at and during trial. Because the Homicide Calendar Judge had denied severance, the trial judge, being an equal member of the same court, did not have the authority to overrule her. Your brief writer, therefore, took every opportunity to renew his motion for severance on any possible additional ground. It was argued that appellant should not have been forced to trial with a codefendant who faced the death penalty when appellant did not. Twenty-three prospective jurors were excused for cause after they said that they could not impose the death penalty, though they could impose a life sentence. To that extent, appellant was denied a fair trial by his peers, who included people against the death penalty. Accordingly, three motions to sever were made for this additional reason. They, too, were denied.

None of the five codefendants testified in this case. The redacted confessions of two of them were read to the jury. In her summation, the prosecutor destroyed the purpose of said redactions by gesturing toward all the codefendants and arguing that the said confessions proved that all of them committed this crime together. This also made the defenses antagonistic. Severance should have been granted by the trial judge for this reason. Appellant relied on his presumption of innocence. His defense was to plead not guilty, and require the Commonwealth properly to prove his guilt. The redacted statements did not implicate him explicitly (though they did by implication), but when the prosecutor argued in [12] her closing as described, she further turned the confessions of the codefendants into "testimony" against him. If this "testimony" were believed, it would be highly antagonistic to his plea of not guilty and most prejudicial against him. His presumption of innocence was shattered.

Though the trial judge had ruled that the details of a separate attempted robbery could not be admitted because it was not a signature crime, he did allow the prosecutor to show that four of the five codefendants had been together in a similar vehicle in that neighborhood a few days later and that one of them had a gun. He directed the prosecutor to instruct Officer Mitchell McKeever not to refer to the incident as a robbery or an attempted robbery, not to mention that there was an arrest, never mind a conviction, and to give no other than the said information about that occurrence.

Though the prosecutor reported to the trial judge that she confirmed all of this with the said officer, he nonetheless went on to testify that a codefendant had

pointed a gun at him and pulled the trigger, which in fact made out the crime of attempted murder. The prosecutor also violated the judge's limiting instructions when she asked Officer Mitchell McKeever if he had arrested a codefendant in this separate attempted robbery. He said that he did.

Severance again was requested but not granted after these severely prejudicial violations of the judge's specific instructions. Since it was the capital codefendant who allegedly had the gun and committed said act, had severance been granted, this would not have been disclosed, since it was elicited during his counsel's cross-examination. Your brief writer would not have asked the questions about the circumstances of that codefendant and his gun. [13] Repeatedly, and for any possible reason, severance was requested, but the trial judge would not disturb the Homicide Calendar Judge's pretrial ruling. [14]

ARGUMENT

APPELLANT SHOULD HAVE BEEN GRANTED A SEVERANCE FROM HIS CODEFENDANTS.

On July 25, 1995, a motion pursuant to Pennsylvania Rule of Criminal Procedure 1128 was filed seeking severance of appellant's trial from his four codefendants. The Homicide Calendar Judge, the Honorable Carolyn Engel Temin, held hearings on August 14, October 2, and November 13, 1995, when she denied said motion. She redacted the codefendants' statements for trial by referring to them as "guys" and allowing the number of "guys" to be told to the jury. So that if "two guys" were in the car and "three guys" went in to the store or "two guys" remained on one side of the counter, the jury was so told.

This redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster. The redaction merely deletes appellant's name, not his existence nor that of his codefendants, nor their number, nor their relationship, thus leaving every indication of redaction. With five codefendants sitting together before the jury, it was corroborative of the Commonwealth's position that these five were the "guys" in the redacted confessions introduced at trial. The further specificity that "two guys" did this and "three guys" did that made this impossible for the jury to ignore.

In codefendant Finney's confession, Commonwealth Exhibit 29, pages 2 and 3 (introduced on March 5, 1996, N.T. 111 and 117), Finney states that he and "two guys" went into the store, where "two guys stayed up front and I stayed to the back." On page 4, he says that he has known one of these "guys" all of his life and "the other 3 about 7 years." (*Id.* at 118.) Asked for their names, he gives them, but they are left blank for the jury (*ibid.*): "one is and the other is." Asked to identify photos of those involved, codefendant Finney's statement is read to the jury as follows (*id.* at 119): [15]

> ANSWER: Number three is. Number six is. Number eight is.
>
> QUESTION: Do you know a guy named blank? I know a blank.
>
> QUESTION: Can you identify this picture?
>
> ANSWER: Yes. That's him. Identified photo number of photo of blank.

Codefendant Womack's confession was introduced on March 6, 1996, as Commonwealth Exhibit 32. (N.T. 3/6/96 32 and 38.) He also said that only three people entered the store, while he and "another guy" waited in the car. (*Id.* at 38.) Asked who did the shooting, the reply is (*ibid.*) "his name is blank." When asked about the names of the others, he tells what he knows and the jury hears (*id.* at 39): "We call him blank."

None of the five codefendants testified. Appellant was not confronted with any of them. Yet, from the said two confessions admitted into evidence, the jury had corroboration that three others besides Finney and Womack committed the crime together and that these "guys" were known to each other for many years. No instruction by the court to only consider the confession as evidence against its maker could be relied upon to keep the jury from figuring out that the five "guys" referred to in the two confessions must be the five codefendants sitting together at the defense table. If not, why would the names be blanked out of the confessions and all references be to "guys" and "others"?

Just in case the jury was not bright enough to do this, in her summation the prosecutor referred to the confessions, pointed to appellant and his codefendants and said that the confessions proved that they did this crime with the others. The defense request for mistrial was denied. (N.T. 3/8/96 64-68.) The trial judge's cautionary (but hardly curative) instruction that followed (*id.* at 69) could not possibly undo the harm. It could not erase [16] from the jurors' minds the prosecutor's powerful (but impermissible) argument, which was a total corruption of the purpose of redaction.

Such tactic by the prosecutor also made the defenses antagonistic even under the standard set forth in *Commonwealth v. Marinelli*, 547 Pa. 294, 690 A.2d 203, 213 (1997). Severance should have been granted by the trial judge. Appellant relied on his presumption of innocence. His defense was to plead not guilty, and require the Commonwealth properly to prove his guilt. The redacted statements did not implicate him explicitly (though they did by implication), but when the prosecutor argued in her closing as described, she further turned the confessions of the codefendants into constructive antagonistic "testimony" against him. If this "testimony" were believed, it would be highly antagonistic to his plea of not guilty and most prejudicial against him. His presumption of innocence was shattered. His right of confrontation, under the Sixth Amendment as made applicable to the states through the Fourteenth Amendment of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution, was denied him.

Gray v. Maryland, 523 U.S. (page number will not be assigned for another year and, hence, this U.S. citation will be omitted *infra*), 118, S. Ct. 1151, 140 L. Ed. 2d 294 (1998), prohibits what transpired herein and absolutely mandates a new trial. In *Gray*, the United States Supreme Court analyzed *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987), and held as follows (118 S. Ct. at 1154-1156):

> In deciding whether *Bruton*'s protective rule applies to the redacted confession before us, we must consider both *Bruton*, and a later case, [17] *Richardson v. Marsh,* 481 U.S. 200 (1987),

which limited *Bruton*'s scope. We shall briefly summarize each of these two cases.

Bruton, as we have said, involved two defendants – Evans and Bruton – tried jointly for robbery. Evans did not testify, but the government introduced into evidence Evan's confession, which stated that both he (Evans) and Bruton together had committed the robbery. 391 U.S. at 124. The trial judge told the jury it could consider the confession as evidence only against Evans, not against Bruton. *Id.* at 125.

This Court held that, despite the limiting instruction the introduction of Evans' out-of-court confession at Bruton's trial had violated Bruton's right, protected by the Sixth Amendment, to cross-examine witnesses. *Id.*, at 137. The Court recognized that in many circumstances a limiting "instruction will adequately protect one defendant from the prejudicial effects of the introduction at a joint trial of evidence intended for use only against a different defendant. *Id.* at 135. But it said that

> "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the

> defendant, are deliberately spread before the jury in a joint [18] trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . . The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." *Id.*, at 135-136 (citations omitted).

The Court found that Evans' confession constituted just such a "powerfully incriminating extrajudicial statemen[t]," and that its introduction into evidence, insulated from cross-examination, violated Bruton's Sixth Amendment rights. *Id.* at 135.

In *Richardson v. Marsh*, *supra*, the Court considered a redacted confession. The case involved a joint murder trial of Marsh and Williams. The State had redacted the confession of one defendant, Williams, so as to "omit all reference" to his codefendant, Marsh — "indeed, to omit all indication that *anyone* other than. . . . Williams" and a third person had "participated in the crime." *Id.*, at 203 (emphasis in original). The trial court also instructed the jury not to consider the confession against Marsh. *Id.* at 205. As redacted, the confession indicated that Williams and the third person had discussed the murder in the front seat of a car while they traveled to the victim's house. *Id.* at 203-204, n.1. The redacted confession contained no indication that Marsh – or any other person – was in the car. *Ibid.* Later in the trial, however, Marsh testified that she was in the back seat [19] of the car. *Id.* at 204. For that reason, in context, the confession still could have helped convince the jury

that Marsh knew about the murder in advance and therefore had participated knowingly in the crime.

The Court held that this redacted confession fell outside *Bruton*'s scope and was admissible (with appropriate limiting instructions) at the joint trial. The Court distinguished Evans' confession in *Bruton* as a confession that was "incriminating on its face," and which had "expressly implicat[ed]" Bruton. 481 U.S. at 208. By contrast, Williams' confession amounted to "evidence requiring linkage" in that it "became" incriminating in respect to Marsh "only when linked with evidence introduced later at trial." *Ibid.* The Court held

> "that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." *Id.*, at 211.

The Court added: "We express no opinion on the admissibility of a confession in which the defendant's name had been replaced with a symbol or neutral pronoun." *Id.* at 211, n. 5.

> Originally, the codefendant's confession in the case before us, like that in *Bruton*, referred to, and directly implicated another defendant. The State, however, redacted that confession by removing the nonconfessing defendant's name. Nonetheless, unlike Richardson's redacted confession, [20] this confession refers directly to the "existence" of the nonconfessing defendant. The State has simply replaced the

> nonconfessing defendant's name with a kind of symbol, namely the word "deleted" or a blank space set off by commas. The redacted confession, for example, responded to the question "Who was in the group that beat Stacey," with the phrase, "Me, _____ and a few other guys." *See* Appendix, *infra,* at ___. And when the police witness read the confession in court, he said the word "deleted" or "deletion" where the blank spaces appear. We therefore must decide a question that *Richardson* left open, namely whether redaction that replaces a defendant's name with obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls within *Bruton*'s protective rule. We hold that it does.

Bruton, as interpreted by *Richardson,* holds that certain "powerfully incriminating extrajudicial statements of a codefendant" – those naming another defendant – considered as a class, are so prejudicial that limiting instructions cannot work. *Richardson,* 481 U.S. at 207; *Bruton,* 391 U.S. at 135. Unless the prosecutor wishes to hold separate trials or to use separate juries or to abandon use of the confession, he must redact the confession to reduce significantly or to eliminate the special prejudice that the *Bruton* Court found. Redactions that simply replace a name with an obvious blank space or a word such as "deleted" or a symbol or other similarly obvious indications of alteration, however, leave statements that, considered as a [21] class, so closely resemble *Bruton*'s unredacted statements that, in our view, the law must require the same result.

For one thing, a jury will often react similarly to an unredacted confession and a confession redacted in this way, for the jury will often realize that the confession refers specifically to the defendant. This is true even when the State does not blatantly link the defendant to the deleted name, as it did in this case by asking whether Gray was arrested on the basis of information in Bell's confession as soon as the officer had finished reading the redacted statement. Consider a simplified but typical example, a confession that reads "I, Bob Smith, along with Sam Jones, robbed the bank." To replace the words "Sam Jones" with an obvious blank will not likely fool anyone. A juror somewhat familiar with criminal law would know immediately that the blank, in the phrase "I, Bob Smith, along with [_____], robbed the bank," refers to defendant Jones. A juror who does not know the law and who therefore wonders to whom the blank might refer need only lift his eyes to Jones, sitting at counsel table, to find what will seem the obvious answer, at least if the juror hears the judge's instruction not to consider the confession as evidence against Jones, for that instruction will provide an obvious reason for the blank. A more sophisticated juror, wondering if the blank refers to someone else, might also wonder how, if it did, the prosecutor could argue the confession is reliable, for the prosecutor, after all, has been arguing that Jones, not someone else, helped Smith commit the crime.

[22] For another thing, the obvious deletion may well call the jurors' attention specially to the removed name. By encouraging the jury to speculate about the reference, the redaction may overemphasize the importance of the confession's accusation – once the

jurors work out the reference. That is why Judge Learned Hand, many years ago, wrote in a similar instance that blacking out the name of a codefendant not only "would have been futile. . . . [T]here could not have been the slightest doubt as to whose names had been blacked out, but "even if there had been, that blacking out itself would have not only laid the doubt, but underscored the answer." *United States v. Delli Paoli,* 229 *F.2d* 319 321 (CA2 1956), *aff'd.*, 352 U.S. 232 (1957), *overruled by Bruton v. United States,* 391 U.S. 123 (1968). See also *Malinski v. New York,* 324 U.S. 401, 430 (1945) (Rutledge, J., dissenting) (describing substitution of names in confession with "X" or "Y" and other similar redactions as "devices. . . . so obvious as perhaps to emphasize the identity of those they purported to conceal").

Finally, *Bruton*'s protected statements and statements redacted to leave a blank or some other similarly obvious alteration, function the same way grammatically. They are directly accusatory. Evans' statement in *Bruton* used a proper name to point explicitly to an accused defendant. And *Bruton* held that the "powerfully incriminating" effect of what Justice Stewart called "an out-of-court accusation," 391 U.S., at 138 (Stewart, J., concurring), creates a special, and vital, need for cross-examination – a need that would be immediately obvious had the codefendant pointed directly to the defendant [23] in the courtroom itself. The blank space in an obviously redacted confession also points directly to the defendant, and it accuses the defendant in a manner similar to Evans' use of Bruton's name or to a testifying codefendant's accusatory finger. By way of contrast, the factual statement at issue in *Richardson*

– a statement about what others said in the front seat of a car – differs from directly accusatory evidence in this respect, for it does not point directly to a defendant at all.

We concede certain differences between *Bruton* and this case. A confession that uses a blank or the word "delete" (or, for that matter, a first name or a nickname) less obviously refers to the defendant than a confession that uses the defendant's full and proper name. Moreover, in some instances the person to whom the blank refers may not be clear: Although the follow-up question asked by the State in this case eliminated all doubt, the reference might not be transparent in other cases in which a confession, like the present confession, uses two (or more) blanks, even though only one other defendant appears at trial, and in which the trial indicates that there are more participants than the confession has named. Nonetheless, as we have said, we believe that, considered as a class, redactions that replace a proper name with an obvious blank, the word "delete," a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results. [24] Putting aside the prosecutorial misconduct during summation described above in the case at hand, the redaction method used herein clearly left every indication of redaction and, therefore, did not satisfy the standard set forth in *Gray*.

Pretrial severance should have been granted. It also should have been granted when raised anew at and during trial. The Homicide Calendar Judge had denied severance after pretrial hearings. Because the trial judge was an equal member of the same court, he

did not have the authority to overrule her. Your brief writer, therefore, took every opportunity to renew his motion for severance on any possible additional ground. It was argued that appellant should not have been forced to trial with a codefendant who faced the death penalty when appellant did not. Twenty-three prospective jurors were excused for cause after they said that they could not impose the death penalty, though they could impose a life sentence. To that extent, appellant was denied a fair trial by his peers, who included people against the death penalty. Accordingly, three motions to sever were made for this additional reason. They, too, were denied during jury selection before the Honorable John J. Poserina, Jr., on February 12 (N.T. 2/12/96 57), 13 (N.T. 2/13/96 54), and 14 (N.T. 2/14/96 22), 1996.

Though the trial judge had ruled that the details of a separate attempted robbery could not be admitted because it was not a signature crime, he did allow the prosecutor to show that four of the five codefendants had been together in a similar vehicle in that neighborhood a few days later and that one of them had a gun. He directed the prosecutor to instruct Officer Mitchell McKeever not to refer to the incident as a robbery or an attempted robbery, not to mention that there was an arrest, never mind a conviction, and to give no other than the said information about that occurrence. [25]

Though the prosecutor reported to the trial judge that she confirmed all of this with the said officer, he nonetheless went on to testify that a codefendant had pointed a gun at him and pulled the trigger, which in fact made out the crime of attempted murder. The prosecutor also violated the judge's limiting

instructions when she asked Officer Mitchell McKeever if he had arrested a codefendant in this separate attempted robbery. He said that he did.

Severance again was requested, as well as a mistrial, but not granted (N.T. 3/5/96 81-82, 86) after these severely prejudicial violations of the judge's specific instructions. Since it was the capital codefendant who allegedly had the gun and committed said act, had severance been granted, this would not have been disclosed, since it was elicited during his counsel's cross-examination. Your brief writer would not have asked the questions about the circumstances of that codefendant and his gun. Repeatedly, and for any possible reason, severance was requested, but the trial judge would not disturb the Homicide Calendar Judge's pretrial ruling.

The record before Your Honorable Court does not contain one word incriminating appellant. That is because the trial notes of testimony of the only witness, Demond Jackson, who implicated him, have been lost. The Commonwealth has acknowledged this. This witness had three open drug cases to be prosecuted by the same District Attorney's office involved in the instant case. He gave contradictory statements and admitted to lying about many matters. He also acknowledged that he knew that he could be charged with the instant murder and another attempted robbery in which he was shot in the hand. He testified that the police put the drugs on him in his case, and that the detectives corrected the mistakes he made in his statement about the instant case. [26]

Appellate review may allow some trial errors to be deemed insignificant where there is overwhelming

evidence of guilt. Herein, such is not the case. Not at all. No victim identified appellant, who gave no confession, and no scientific evidence placed him at the scene. Therefore, the harmless error test set forth in *Commonwealth v. Story*, 476 Pa. 391, 383 A.2d 155 (1978), and the harmless error analysis approved in *Commonwealth v. Chestnut*, 511 Pa. 169, 512 A.2d 603 (1986), would dictate a new trial herein, because of the erroneous denial of severance.

Furthermore, in light of *Gray*, *Story* and *Chestnut* seem to be inapropos when the admitted redacted statement of a nontestifying codefendant retains indications of redaction. Similarly, *Commonwealth v. Bond*, 539 Pa. 299, 652 A.2d 308 (1995), which held that an error is harmless (*id.* at 313, 652 A.2d at 314) "only when in light of the overwhelming evidence of guilt it was so insignificant that it could not have contributed to the verdict," also compels a new trial. As explained, the evidence herein was paltry at best. And again, under *Gray*, redaction that leaves indications of redaction, such as herein, cannot be harmless error because the Sixth Amendment's confrontation clause thus is violated. One cannot cross-examine a statement about its indications of redaction or alteration. Fundamental due process requires a new trial. [27]

CONCLUSION

WHEREFORE, it sincerely is requested, for all of the above reasons, that Your Honorable Court grant appellant a new trial.

Respectfully submitted,
/S/ Joel S. Moldovsky
JOEL S. MOLDOVSKY, ESQUIRE
Court-appointed Attorney for Appellant

* * * * *

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 31 E.D. APPEAL DOCKET, 1998

COMMONWEALTH OF PENNSYLVANIA,
Appellee

v.

JARMAINE Q. TRICE,
Appellant

BRIEF FOR APPELLEE

Appeal from the December 16, 1997 Judgment of Superior Court at No. 1829 Philadelphia 1996 Affirming the May 13, 1996 Judgment of Sentence in the Court of Common Pleas of Philadelphia County, Trial Court Division, Criminal Section, Information No. 118 1/6, June Term, 1995.

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CATHERINE MARSHALL
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* * * * *

[1]

COUNTER STATEMENT OF THE QUESTION PRESENTED

1. May defendant claim entitlement to retroactive application of the new rule announced in *Gray v. Maryland*, where he never preserved an objection based on that new rule at trial, on direct appeal, or in his *allocatur* petition?

(Not addressed by the courts below.)

2. Is defendant entitled to a new trial where he has demonstrated no gross abuse of discretion in the trial court's denial of his motion for severance in this five co-defendant trial?

(Answered in the negative by the courts below.)

3. Is defendant entitled to a new trial based on an unpreserved claim that the trial court violated the new rule announced in *Gray v. Maryland*, where the redaction of the co-defendants' statements substantially complied with the new rule, and any deviation from it constituted harmless error?

(Not addressed by the courts below.)

[2] COUNTER-STATEMENT OF THE CASE

This is a discretionary appeal by defendant, who participated in a robbery in which one of his co-conspirators fatally shot the owner of a small grocery store. He was convicted by a jury of second degree murder and related offenses and sentenced to life imprisonment.[1] The sole claim presented in this

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[1] Information No. 118 1/6, June Term, 1995.

appeal involves whether defendant's trial should have been severed from that of his four co-conspirators. The relevant facts are as follows.

On December 11, 1993, at or about 6:30 p.m., defendant and his co-defendants Julius Jenkins, Atil Finney, Gregory Womack, and Naree Abdullah travelled from Germantown to North Philadelphia in Womack's 1979 Oldsmobile station wagon. With them in the car was one Demond Jackson, who had asked them for a ride. Co-defendant Womack parked the vehicle around the corner from Lilly's Market, which was located at 3122 West York Street. Defendant and co-defendants Jenkins, Finney and Abdullah then got out of co-defendant Womack's car and walked toward the store. Jackson stayed in the car with Womack (N.T. 2/29/96, 41-58; N.T. 3/4/96, 62-63, 66-69, 76-79).

Defendant and the others entered the market, where Jenkins approached the counter, pulled out a gun and announced a holdup. Francisco Azcona, the owner of the store, was crouched down behind the counter. His wife, Anna Azcona, and his sister-in-law, Andrea Rodriguez, were standing behind the counter in view of the robbers. When Jenkins went behind the counter and saw Mr. Azcona, he fired [3] a single shot penetrating the victim's jaw and neck, severing his carotid artery and causing him to bleed to death. Both Mrs. Azcona and her sister, Ms. Rodriguez, said that three or more men had entered the market and committed the robbery, and both women positively identified Jenkins as the man who fatally shot Mr. Azcona (N.T. 2/26/96, 108-109, 114-120, 127-131, 179-186; N.T. 2/27/96, 2-23, 61-82, 114-117; N.T. 3/4/96, 119-122, 125-127, 138-144; N.T. 3/5/96, 26-33; N.T. 3/6/96, 11-31).

About five minutes after defendant and his three co-conspirators had left the car, Demond Jackson heard a gunshot and, then, he saw the four men come running back to Womack's car. At this time, defendant was carrying a cash register. Jackson's account was corroborated in large part by Keenan Roach, who was on his way to Lilly's Market when he saw four young men "trotting" down the street, with one of the men carrying a gun and another a cash register. Womack then drove the men to Abdullah's house, where the money from the cash register was divided between the coconspirators. Demond Jackson, however, refused to take a share of the proceeds (N.T. 2/26/96, 138-149; N.T. 2/29/96, 59-65; N.T. 3/4/96, 64-66, 79-81).

Three days later, on December 14, 1993, defendant and co-defendants Womack, Jenkins and Abdullah went to the Ace Check Cashing Agency at 2400 North 29th Street, which was located approximately two blocks from Lilly's Market. After entering and exiting that establishment, they walked back to Womack's station [4] wagon.[2] Co-defendant Jenkins was

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[2] Inside the check cashing agency they committed another robbery, but the trial judge ultimately ruled that this fact was inadmissible. The court had initially ruled, pre-trial, that evidence of the Ace Check Cashing robbery would be admissible to "show a common plan, scheme and design and methodology and access to the weapon that was used in fact in this murder case" (N.T. 2/12/96, 16). At trial, however, in response to a defense motion, the court altered its previous ruling to exclude any mention of the robbery at the check cashing agency, but to permit the Commonwealth to show that four of the five co-conspirators were together three days after the robberies and murder at Lilly's Market, and that co-defendant Jenkins was in possession of the murder weapon at that time (N.T. 2/26/96, 60-62; N.T. 3/5/96, 4-20). The jury was thereafter clearly instructed as to the limited

observed by a police officer with a gun and was subsequently arrested. The .45 caliber gun possessed by Jenkins was subsequently determined to be the same weapon used to murder Francisco Azcona (N.T. 3/5/96, 39-41, 62-73, 76-77, 94-103).

In addition, following their arrests in connection with the murder and robberies at Lilly's Market, co-defendants Gregory Womack and Atil Finney made inculpatory statements to police admitting their participation in those crimes. Finney admitted to entering the store along with the other robbers and to sharing in the proceeds of the crime, while Womack admitted to driving the other robbers to and from Lilly's Market and to taking a share of the proceeds (N.T. 3/5/96, 106-129; N.T. 3/6/96, 32-46).[3]

On June 22, 1995, the Commonwealth filed notice of its intent [5] to try the defendant and all of his co-defendants jointly pursuant to Pa.R.Crim.P. 1127. Defendant filed a severance motion on July 25, 1995, alleging that he would be prejudiced by a joint trial because the Commonwealth was seeking the death penalty for co-defendant Julius Jenkins, and because the inculpatory statements of other co-defendants would be admitted into evidence. The motion also contained a general averment that the defenses of the co-defendants would be "antagonistic" to that of

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purpose for which this evidence could be considered (N.T. 3/5/96, 90-91; N.T. 3/11/96, 12-14).

[3] At trial, these statements were admitted into evidence, but all references to the names of the other participants in the crimes were redacted. The trial court, moreover, clearly instructed the jury on several occasions that each statement could only be considered as evidence against the person who made it (N.T. 3/5/96, 125; N.T. 3/8/96, 69; N.T. 3/11/96, 14, 16).

defendant. Argument on the severance motion was heard on August 14, 1995 before the Honorable Carolyn Engel Temin, who denied the motion on November 13, 1995. Thereafter, jury selection commenced on February 12, 1996 and was completed on February 22, 1996. On February 26, 1996, a suppression motion in which co-defendant Womack contested the voluntariness of his statement to police was heard and denied. The jury was then sworn and trial commenced before the Honorable John J. Poserina, Jr.

After a lengthy trial, the jury returned its verdicts on March 13, 1996, finding defendant guilty of second degree murder, three counts of robbery, and criminal conspiracy.[4] Defendant was immediately sentenced to life imprisonment on his conviction of second degree murder and, on May 13, 1996, he received an [6] additional consecutive sentence of five to ten years imprisonment for one of the three robbery counts of which he was convicted.[5] Defendant then filed a direct appeal in Superior Court which, on December 16, 1997, affirmed his judgments of sentence. On August 14, 1998, this Court granted defendant's petition for allowance of appeal limited to the following issue:

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[4] Co-defendants Finney, Womack, and Abdullah were convicted of identical charges, while co-defendant Jenkins was found guilty of first degree murder, three counts of robbery, criminal conspiracy, and possession of an instrument of crime. A penalty hearing was held for Jenkins on March 14, 1996, at which the jury determined that the mitigating circumstances outweighed the aggravating circumstances and, accordingly, imposed a sentence of life imprisonment.

[5] No further penalty was imposed on defendant's remaining convictions of two counts of robbery, and conspiracy.

"[W]hether the common pleas court erred by denying the motion for severance thereby resulting in the violation of [defendant's] Sixth Amendment right of confrontation upon the admission of statements given by his nontestifying codefendants."[6] [7]

SUMMARY OF ARGUMENT

The trial court did not commit a manifest abuse of discretion by denying defendant's motion to sever his trial from that of his four co-defendants just because inculpatory statements of two of those co-defendants were admitted into evidence at the joint trial. The policy in this Commonwealth clearly favors joint trials of coconspirators, and severance is not required when the statements of non-testifying co-defendants can be redacted to eliminate any explicit reference to the defendant and to avoid any overt indication that the statements have been altered.

Instantly, the trial court redacted the co-defendants statements in a manner consistent with this Court's precedent at the time of its ruling on defendant's severance motion. The new rule announced by the United States Supreme Court in *Gray v. Maryland*, which was decided after defendant's trial and Superior Court appeal, should not apply retroactively in this case because defendant did not preserve at any stage of the proceedings below a challenge to the redacted statements of his co-

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[6] In his brief to this Court, defendant refers to other issues he raised in Superior Court that are clearly outside the scope of this Court's limited grant of *allocatur* in this case. Accordingly, the Commonwealth will limit its discussion in this brief to the alleged violation of defendant's confrontation rights based upon the lower court's denial of his severance motion.

defendants that in any way resembled the issue in *Gray*.

Moreover, the redactions of the statements in this case substantially complied with the dictates of *Gray*, despite the fact that that case had not yet been decided. And, to the extent the redactions do not fully comport with the new rule in *Gray*, any potential violation of defendant's Sixth Amendment right of confrontation, under the circumstances of this case, was clearly harmless error. This is so because the prosecutor never tried to [8] inculpate defendant by referring to the co-defendants' statements, none of the redactions obviously referred to defendant, and there was ample independent evidence of defendant's guilt.

Accordingly, defendant is not entitled to the grant of a new trial on grounds that the denial of his severance motion constituted a gross abuse of discretion. [9]

ARGUMENT

I. Defendant Is Not Entitled to Retroactive Application of the New Rule in *Gray v. Maryland*, Which Was Announced by the United States Supreme Court While His *Allocatur* Petition Was Pending, But Which He Did Not Raise and Preserve in the Courts Below.

Defendant filed a pre-trial motion to have his trial severed from that of his four co-defendants, in part, because inculpatory statements given by two of his co-defendants would be admitted at the joint trial. The trial court denied defendant's motion, but redacted each of the co-defendants' statements to remove all explicit references to the names of the non-confessing defendants.

Defendant did not challenge the trial court's manner of redaction, but argued that no form of redaction would protect his confrontation interests. This contention was properly rejected by both the trial court and the Superior Court.

The United States Supreme Court's recent decision in *Gray v. Maryland*, 118 S. Ct 1151 (1998) does not support defendant's trial objection that no form of redaction is permissible under *Bruton*. On appeal, defendant continues to argue that redaction was not a sufficient remedy, but now improperly alters his challenge so as to vaguely reference a purported violation of *Gray v. Maryland*, *supra*. The effort must be rejected and the Superior Court affirmed.[7] [10]

On March 9, 1998, while defendant's petition for allowance of appeal was pending before this Court, the United States Supreme Court decided *Gray v. Maryland*, *supra*. *Gray* substantially altered the rule in *Bruton v. United States*, 411 U.S. 223 (1973), which allowed introduction of a non-testifying co-defendant's confession into evidence at a joint trial, so long as that confession did not expressly name the defendant as a participant in the crime. In the aftermath of *Bruton*,

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[7] Significantly, defendant still maintains in his brief in this Court, contrary to *Gray*, that the trial court erred in failing to redact the co-defendants statements' so that there would be no reference to any other participant, other than the statement-giver himself. To the extent defendant discusses the application of *Gray* to his case at all, he simply reproduces large segments of the United States Supreme Court opinion as if it were the text of his own brief. The absence of any meaningful argument based on the [10] actual holding of *Gray*, and defendant's continued insistence that even the redaction permitted under *Gray* violates his confrontation rights, should preclude the grant of relief.

courts had generally held that a *Bruton* violation could be avoided by redacting the co-defendant's confession to replace the defendant's name with a neutral pronoun or symbol, combined with a jury instruction that the confession could only be considered as evidence against the confessing co-defendant. *Gray*, however, significantly extended the rule in *Bruton* to bar not only confessions by a co-defendant which expressly named the defendant, but also those where the defendant's name has been replaced with a symbol, such as "X" or "Y," or other obvious indications of alteration such as a blank space or the words "blank" or "deleted."

Defendant never argued, in either the trial court or Superior Court, that replacing his name in his co-defendant's confessions with symbols or blanks was an inadequate remedy under *Bruton*. Nor did he object to the redacted versions of the statements as introduced into evidence at his trial. Indeed, during argument on [11] his severance motion, defendant expressly agreed to the form of redaction suggested by the lower court that identified the various actors in the statements as "x," "y," and "z" (N.T. 8/14/95, 18-20, 22).[8] [12]

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[8] Defendant's various failures to preserve any claim under *Gray* below were quite explicit, and could never have given the lower court any clue that he was seeking relief in anticipation of the new redaction rule:

THE COURT: Well I'm not ready to make a redaction ruling. But let me ask you a hypothetical. It's unusual to do this, but suppose the statement is redacted to say, "I didn't take the cash register." In other words, each defendant's statement would state —

MR. MOLDOVSKY: I didn't take it.

THE COURT: — "I didn't. Someone else took the cash register.

MR. MOLDOVSKY: There's another nuance that I want Your Honor to know because your suggestion is brilliant.

N.T. 8/14/95, 18 (emphasis added).

THE COURT: Well, then, in that case, they are not interlocking. One statement would say X took the cash register, and the other would say Y and Z took it; and then you get the non-defendant witness who says their client took it, but the jury has information that three different people have been named as having taken the cash register.

So, how does that pin point your client?

MR. MOLDOVSKY: Well, Your Honor, it sounds excellent when you're saying it, but if you were sitting as the trial Court, I don't know that the trial Judge is going to instruct the District Attorney to have the detectives read: this person says that A took it, and this person says that another person we will call B took [12] it, and this other person, the third person, doesn't say who took it, just that someone —

THE COURT: — Well, if the statements were redacted, and I have never myself had a redaction problem, such as you posit, but it seems to me that the fair way to redact these three different [people], is to refer to three different [letters].

MR. MOLDOVSKY: As long as I would be allowed to argue in my closing speech that you heard what you heard and you heard that there were different people, then I would have no problem —

N.T. 8/14/95, 19-20 (emphasis added).

The record thus establishes that defendant sought only a complete redaction of references to all co-participants in the statements, so that the statement-giver would appear to have acted entirely alone. And, alternatively, he approved of a proposed redaction that substituted different letters of the alphabet to designate several different actors. Neither theory presented below remotely implicates the new rule in *Gray*. Rather, defendant's all-or-nothing objection to any reference to a co-participant and his clear approval of redaction with letters constitute an express waiver of any potential claim under *Gray*.

Notwithstanding his failure to preserve any claim under *Gray*, [13] defendant still argues that the decision should now apply to his case. The law is to the contrary.

An appellate decision announcing a new rule of law will be applied retroactively only "to cases where the issue in question is properly preserved at all stages of adjudication up to and including any direct appeal." *Commonwealth v. Cabeza*, 503 Pa. 228, 233, 469 A.2d 146, 148 (1983). *See also Blackwell v. Commonwealth, State Ethics Com'n.*, 527 Pa. 172, 188, 589 A.2d 1094, 1102 (1991); *Commonwealth v. Parker*, 644 A.2d 1245, 1249 n.2 (Pa. Super. 1994), *allocatur denied*, 540 Pa.

THE COURT: — [A]s I understand it, Mr. Moldovsky and Mr. Medway . . . are satisfied with their two defendants being tried together, but Mr. Moldovsky is willing to concede that if the redaction can be done so it doesn't nail his client as the person taking the cash register, then his only issue is the death penalty.

N.T. 8/14/95, 22 (emphasis added).

630, 658 A.2d 793 (1995). Because defendant did not preserve a "*Gray v. Maryland* issue" at **any** stage of the proceedings below, he is not now entitled to retroactive application of that decision in this discretionary appeal to this Court.

Indeed, prior to the decision in *Gray* this Court had uniformly rejected claims that severance should have been granted in cases involving the admission of statements by non-testifying codefendants. Thus, in *Commonwealth v. Miles*, 545 Pa. 500, 681 A.2d 1295 (1996), *cert. denied*, 520 U.S. 1187 (1997) all references to the appellant in his two co-defendants' statements were replaced with an "X," and the trial court instructed the jury that such statements could only be considered as evidence against the co-defendant who made the statement. In rejecting the appellant's claim that severance should have been granted the *Miles* Court observed:

> [T]he substitution of the letter "X" for a defendant's name does not violate that defendant's *Bruton* rights if [14] a proper limiting instruction is given, as it was in this case. Thus, because [appellant] has failed to demonstrate how being tried with co-defendants unduly prejudiced him, this claim fails.

Id. at 511, 681 A.2d at 1300 (*citing Commonwealth v. Lee*, 541 Pa. 260, 662 A.2d 645 (1995), *cert. denied*, 517 U.S. 1211 (1996)).

This same rationale was applied by this Court in both *Commonwealth v. Anthony Washington*, 549 Pa. 12, 700 A.2d 400 (1997), *cert. denied*, 118 S. Ct. 2375 (1998) and *Commonwealth v. Vinson Washington*, 547 Pa. 550, 692 A.2d 1018 (1997), *cert. denied*, 118 S. Ct.

1806 (1998).[9] The appellants in both of these cases had argued that severance should have been granted because they were prejudiced by the admission of their co-defendant's redacted confessions which referred to neither appellant by name. *See Commonwealth v. Anthony Washington*, *supra* (substituting word "Blank" for the appellant's name); *Commonwealth v. Vinson Washington*, *supra* (substituting the phrase "the guy with me" for the appellant's name). Furthermore, the juries in both cases were carefully instructed to consider the co-defendant's inculpatory statement only against the maker of the statement. In holding that no abuse of discretion occurred in denying the severance motions in either case, this Court declared that:

> It is well-settled . . . that no *Bruton* violation occurs if the co-defendant's statement is redacted to remove any specific references to the defendant and if a proper limiting instruction is given. *See Richardson v. Marsh*, 481 U.S. 200, 211 (1987); *Commonwealth v. Jones*, 542 Pa. 464, 495-96, 668 A.2d 491, 506 (1996).

[15] *Commonwealth v. Anthony Washington*, *supra* at 25, 700 A.2d at 406; *Commonwealth v. Vinson Washington*, *supra* at 556, 692 A.2d at 1020.[10]

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[9] Although both of these cases involve appeals in capital cases, the cases are otherwise unrelated.

[10] The Superior Court, as well, has found redaction of a co-defendant's statement to be preferable to severance in cases where conspiracy is charged, noting that "[t]he interests of judicial economy commend redaction over severance in a joint trial of co-conspirators." *Commonwealth v. Marsh*, 566 A.2d 296, 298 (Pa. Super. 1989) (*quoting Commonwealth v. Hess*, 548 A.2d 582, 592 (Pa. Super. 1988), *allocatur denied*, 522 Pa. 618, 563

At the time defendant's severance motion was denied, the redacted statements, in their use of blank spaces, were fully consistent with this Court's decisions in *Commonwealth v. Miles*, *supra*; *Commonwealth v. Anthony Washington*, *supra*; and *Commonwealth v. Vinson Washington*, *supra*. Defendant did not argue, as was held in *Gray*, that the blank spaces must be replaced by neutral pronouns in order to conceal the fact that the redaction had occurred. The decision in *Gray v. Maryland*, constituted new law in this respect.

Neither the trial court, nor the Superior Court, had the benefit of *Gray* at the time they passed upon defendant's severance claim, nor would it have mattered if they had. Defendant **never complained** below of the use of blanks in the redacted statements of Finney and Womack. Any redaction procedure necessarily involves a word-by-word and line-by-line analysis of a statement, just as that conducted in *Gray*. Thus, defendant was **obligated** to clearly communicate an objection to the precise form of redaction. Rather, his argument has been, and remains, that **any** form of redaction that [16] did not eliminate **all** reference to the existence of the other actors would have been improper, because the jury would have been able to infer by contextual implication that he was one of those actors. Considering that the sole purpose for timely, explicit objection is to allow a trial court to correct a potential

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A.2d 887 (1989)). *See also Commonwealth v. Pirela*, 580 A.2d 848, 851-852 (Pa. Super. 1990), *allocatur denied*, 527 Pa. 672, 594 A.2d 658 (1991); *Commonwealth v. Council*, 513 A.2d 1003, 1006-1007 (Pa. Super. 1986), *allocatur denied*, 517 Pa. 664, 548 A.2d 253 (1988).

error, defendant provided nothing here that could have conveyed any anticipation of the new rule in *Gray*.

Defendant cannot, at this late stage, simply make a wholesale change of his argument in an attempt to benefit from a change in the law. Because he never preserved in the trial court, the Superior Court, or even in his *allocatur* petition, any challenge to the specific manner in which his co-defendants' statements were redacted, he is not entitled to the retroactive benefit of *Gray* to obtain reversal of his conviction for reasons he did not argue below. [17]

II. In Any Event, the Denial of Severance Does Not Require a New Trial Where the Trial Court's Redaction of a Statement Substantially Complied With the New Rule in *Gray v. Maryland*, and Any Deviation Therefrom Was Harmless Error.

Even if this Court were to decide that *Gray* is applicable herein, defendant has nonetheless failed to establish that the lower court abused its discretion by denying his severance motion.

A motion for severance of the trials of multiple defendants is addressed to the sound discretion of the trial court, and the trial court's denial such a motion may not be reversed on appeal absent a manifest abuse of discretion. *Commonwealth v. Lambert*, 529 Pa. 320, 331, 603 A.2d 568, 573 (1992); *Commonwealth v. Morales*, 508 Pa. 51, 61, 494 A.2d 367, 372 (1985); *Commonwealth v. Schultz*, 707 A.2d 513, 516 (Pa. Super. 1997). Defendant, as appellant, bears the burden of demonstrating that he suffered manifest prejudice as a result of the denial of his severance motion; and he cannot meet that burden by simply asserting that his chance of acquittal might have been

better had severance been granted. *Commonwealth v. Patterson*, 519 Pa. 190, 197, 546 A.2d 596, 599-600 (1988); *Commonwealth v. Lindenmuth*, 554 A.2d 62, 67 (Pa. Super. 1989), *allocatur denied*, 522 Pa. 624, 564 A.2d 916 (1989).

Where, as in this case, the crimes charged against each defendant arise out of the same facts and much of the same evidence is applicable to all defendants, the general policy in this Commonwealth encourages joint trials to conserve limited resources and promote judicial economy by eliminating the duplication of evidence in separate proceedings. *Commonwealth v. Jones*, 542 Pa. 464, 485, 668 A.2d 491, 501 (1995), *cert. denied*, 519 U.S. 826 [18] (1996). *See also Commonwealth v. Rodriguez*, 695 A.2d 864, 871 (Pa. Super. 1997); *Commonwealth v. Childress*, 680 A.2d 1184, 1187 (Pa. Super. 1996), *allocatur denied*, 547 Pa. 723, 689 A.2d 231 (1997); *Commonwealth v. Zaslow*, 671 A.2d 707, 711 (Pa. Super. 1996), *allocatur denied*, 546 Pa. 680, 686 A.2d 1310 (1996). Therefore, "[w]here conspiracy is charged, co-defendants should be tried together." *Commonwealth v. Presbury*, 665 A.2d 825, 827 (Pa. Super. 1995), *allocatur denied*, 544 Pa. 627, 675 A.2d 1246 (1996). *Accord Commonwealth v. Marinelli*, 547 Pa. 294, 313, 690 A.2d 203, 212-213 (1997), *cert. denied*, 118 S. Ct. 1309 (1998); *Commonwealth v. Paolello*, 542 Pa. 47, 70, 665 A.2d 439, 451 (1995); *Commonwealth v. Chester*, 526 Pa. 578, 589, 587 A.2d 1367, 1372 (1991), *cert. denied*, 502 U.S. 959 (1991).

Here, the statements of co-defendant Gregory Womack and co-defendant Atil Finney were introduced into evidence at a joint trial of five co-defendants. These two statements, however, were redacted to

remove any explicit reference to the other defendants in the case. The trial court, moreover, instructed the jury several times that these statements could only be considered as evidence against the defendants who made them. Defendant nevertheless contends that such redaction of the statements of co-defendants Womack and Finney was an inadequate remedy in this case.

Defendant now asserts that the redacted statements in this case failed to comport with the *Bruton* rule as it was substantially altered by the United States Supreme Court's recent decision in *Gray v. Maryland*, *supra*. But he grossly misrepresents the import [19] of that case to support his Sixth Amendment claim.

Defendant argues that by merely deleting his name, but "not his existence nor that of his co-defendants, nor their number, nor their relationship" the statements left every indication of being redacted (Brief for Appellant, 14). Nothing in the United States Supreme Court's decision in *Gray* suggests that the existence of any co-conspirator must be redacted, so that the jury will be led to believe that the confessor acted alone. Nor did *Gray* remotely suggest that the content of a statement had to be substantively rewritten to change the meaning of the confessor's actual words. Rather, the *Gray* Court expressly approved of a redaction procedure that replaced the name of a non-confessing co-conspirator with such innocuous characterizations as "the other guy" or "someone." In large part, that form of redaction is precisely what the trial court did in defendant's case, thus complying with *Gray* before the case was even decided. Defendant's complaint that the redaction of

the co-conspirators names with "two guys" or "three guys" violated his Sixth Amendment confrontation rights is flatly rejected by United States Supreme Court decision. It is precisely such redaction – that does not convey to the jury that something was deleted – that *Gray* endorsed. Defendant's interpretation of *Gray*, to require substantial alteration of a statement to remove all references to other participants in a crime, is baseless.

When read together the decisions of the United States Supreme Court in *Bruton v. United States*, *supra*; *Richardson v. Marsh*, 481 U.S. 200 (1987) and, most recently, in *Gray v. Maryland*, *supra* [20] establish that the introduction of the statement of a nontestifying co-defendant, accompanied by an instruction to the jury to consider the statement only against the co-defendant, will violate a defendant's right of confrontation **only** when the jury could conclude that such statement **on its face** obviously refers to the defendant, without looking contextually to the other evidence in the case. Defendant's entire argument – both at trial and before the Superior Court – was one based on contextual implication. There can be no manifest abuse of discretion in denying a severance motion based on this invalid theory for relief.

Sixth Amendment jurisprudence establishes that defendant's contextual implication theory has never provided the basis for a confrontation clause violation. Nor does it now with the recent decision in *Gray*.

In *Bruton v. United States*, *supra*, the United States Supreme Court held that Bruton's confrontation rights were violated by the introduction

into evidence of the confession of his non-testifying co-defendant which implicated Bruton by name in the commission of the crime, despite the fact that the trial court instructed the jury to consider the confession only against the co-defendant. Because the co-defendant's confession explicitly named him, the Court deemed it to be so "powerfully incriminating" as to Bruton that it was unlikely that the jury would have been able to follow the court's limiting instruction. 391 U.S. at 135-136.

Subsequently, in *Richardson v. Marsh*, *supra*, the Court considered whether a defendant's right of confrontation had been [21] violated by the admission of a co-defendant's confession from which all reference to the defendant had been deleted, and the jury had been specifically instructed to consider the confession only against the co-defendant. The defendant in that case argued successfully in the court of appeals that, despite the redaction, admission of the co-defendant's confession would still violate her confrontation rights because it nonetheless contextually implicated her in the crime when linked with the other evidence in the case.

The United States Supreme Court, however, expressly rejected the theory of contextual implication, recognizing the important distinction between confessions of co-defendants which explicitly incriminate the defendant and those which can become incriminating of the defendant only when linked to other evidence introduced at trial. *Richardson v. Marsh*, 481 U.S. at 208. The Court emphasized that *Bruton* created only a "narrow exception" to the "almost invariable assumption of the law that jurors

follow their instructions," *Id.* at 206-208, and concluded as follows:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process. On the precise facts of *Bruton*, involving a facially incriminating confession, we found that accommodation inadequate. . . . [T]he calculus changes when confessions that do not name the defendant are at issue.

Richardson v. Marsh, at 211.

The Court has recently revisited the *Bruton* issue in *Gray v. Maryland*, *supra*, where a co-defendant's confession was redacted to replace the defendant's name with either a blank space or the word [22] "deleted." This special form of redaction, unlike much redaction for *Bruton* purposes, necessarily conveys to the jury that the confession has been rewritten — since the confessor obviously would not have inserted a blank space or the word "deleted" where a name would otherwise be expected to appear. The *Gray* Court concluded that the risk would be too great that a blank space in a co-defendant's confession would suggest to a jury that the obvious deletion referred to the non-confessing defendant, even without looking to any other evidence in the case. *Id.* at 1155.[11]

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[11] Immediately after the redacted statement in *Gray* was read into evidence by a detective, using the words "deleted" and "deletion" in place of the defendant's name, the prosecutor asked

Thus, read together, *Bruton*, *Richardson*, and *Gray* indicate that a jury instruction not to consider a co-defendant's confession against the defendant will be insufficient to protect the defendant's confrontation rights where the co-defendant's confession specifically names the defendant, as in *Bruton*, or, as was the case in *Gray*, where the jury is explicitly informed – by the use of a blank space or other obvious alteration – that the co-defendant's confession has been tampered with, such that they can readily conclude, **on the face of the statement,** that the blank space refers to the defendant. It is equally clear from these cases, however, that where a co-defendant's confession can be redacted to omit the defendant's name, without obviously informing [23] the jury that the confession has been altered, a jury instruction to consider the confession only against the co-defendant will suffice, even if it is possible that the jury might infer from other evidence in the case that the defendant is implicated by the co-defendant's confession. *See Gray v. Maryland*, *supra* at 1156 ("conced[ing] that *Richardson* placed outside the scope of *Bruton's* rule those statements that incriminate inferentially").[12]

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the witness whether he had arrested the defendant after receiving the co-defendant's confession, to which the detective responded affirmatively. 118 S. Ct. at 1153. This follow-up question, of course, removed any possible ambiguity as to whether the defendant's name had been one of the names deleted from the co-defendant's confession. *Id.* at 1155.

[12] As a specific example of the proper application of the rule in *Bruton*, the Court in *Gray* cited with approval the decision of the Eighth Circuit Court of Appeals in *United States v. Garcia*, 836 F.2d 385 (8th Cir. 1987). *Gray v. Maryland*, *supra* 118 S. Ct. at 1157.

[24] Indeed, the Superior Court has recently interpreted *Gray* in this exact manner. That court reasoned in *Commonwealth v. McGlone*, 716 A.2d 1280 (Pa. Super. 1998), as follows:

In *Garcia*, the co-defendant made a statement that, following a heroin sale, he was instructed to deliver the proceeds to the defendant. The statement was admitted into evidence in redacted form, with the defendant's name replaced by the neutral pronoun, "someone." The defendant argued that *Bruton* was violated because the co-defendant's statement would incriminate him when considered in context with eyewitness testimony identifying him as the man the co-defendant met in an alley after the heroin sale. The *Garcia* Court rejected the defendant's claim, holding that, under the rule announced in *Richardson v. Marsh*, "the indirect inculpatory effect from linking [the co-defendant's] statements and the identification of [defendant] as the person in the alley does not violate *Bruton*." *United States v. Garcia*, 836 F.2d at 390.

The *Garcia* Court further explained its interpretation of *Bruton* in the following manner:

> This court has in the past approved redaction by eliminating reference to the defendant's name, but not to his role in the crime. *United States v. Brierly*, 501 F.2d 1024 (8th Cir.), *cert. denied*, 419 U.S. 1052 (1974). Cases sometimes arise in which the redacted statement alerts the jury to the fact that a name available to the prosecution has been purposely omitted, and this may improperly lead the jury to infer that the omitted name must be the defendant's. *See e.g.*, *Clark v. Maggio*, 737 F.2d 471, 476-79 (5th Cir. 1984), *cert. denied*, 470 U.S. 1055 (1985). In this case, however, the language in the statement as testified to did not draw attention [24] to the fact that the prosecution had the name available to it and purposely omitted it from the statement.

836 F.2d at 390-391. *Gray* specifically approved *Garcia's* interpretation of *Bruton*.

We interpret *Gray* as precluding the prosecution from offering a statement where the redaction itself is obvious to the jury, thereby drawing attention to the codefendant. Use of the term "deleted" or "X" immediately signals jurors that a specific person was named by the declarant and they, the jurors, are not permitted to know that name. Coupled with the court's instruction that the jury refrain from using the statement against the codefendant, the redacted statement becomes "powerfully incriminating," placing it within *Bruton's* protection. *See Gray, supra* at___,118 S. Ct. at 1157 (redacted confession "with blank prominent on its face" incriminates the co-defendant). The term "other man" does not have the same forceful impact. Not only does the term eliminate the name of the defendant, it also eliminates the fact that an alteration has been made. The powerfully incriminating nature of an obvious and glaring "hole" in the statement simply is not present when a generic term like "other man" is used.

. . . [W]e observe that the *Gray* Court, while refining *Bruton* and *Richardson*, did not abandon the notion of inference or contextual inculpation. Instead, the Court reaffirmed *Richardson's* approval of statements that do not "refer directly to the defendant himself and which become incriminating only when linked with evidence introduced later at trial." *Id.*, at ___, 118 S. Ct. at 1157. What is prohibited are inferences involving statements that, "despite redaction, obviously refer directly to someone,

> often obviously the defendant, and which involve **inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial.**" *Id.* (emphasis supplied).
>
> Appellant argues that the non-testifying co-defendant's statement is inadmissible under *Gray* because the statement, coupled with other evidence properly admitted at trial, gives rise to the inference that [25] appellant participated in the crime. We disagree. *Gray* addresses the situation where a redacted statement of the co-defendant **itself** gives rise to the immediate inference that appellant was a participant. Appellant urges us to read *Gray* expansively, which we decline to do. The sixth amendment right of confrontation does not require the scope of protection that appellant seeks.

Id. at 1286 (footnote omitted).[13]

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[13] Other courts, as well, have interpreted *Gray* in a manner consistent with the Superior Court's decision in *McGlone*. *E.g., United States v. Edwards*, 156 F.3d 1117, 1124-1126 (8th Cir. 1998) (redaction of co-defendant's statement with neutral pronouns such as "we," "they," "someone," and "others" did not draw attention to the redaction and, thus, was consistent with holding in *Gray*); *United States v. Valdez*, 146 F.3d 547, 551-552 (8th Cir. 1998), *cert. denied*, 119 S. Ct. 335 (1998) (confessing defendant's reference in his statement to his "accomplice" did not violate *Gray* because it did not suggest that a proper name was purposefully omitted; confession on its face did not implicate co-defendant; only by linking confession to other evidence could jury infer accomplice's identity); *United States v. Cambrelen*, 18 F. Supp.2d 226, 228-230 (E.D.N.Y. 1998) (redactions of co-defendants' confession so as to replace names with words like "guy," "guys," or "the guys" was proper under *Gray*).

Accordingly, even after the decision in *Gray*, severance is not required, contrary to defendant's argument, where statements of non-testifying co-defendants are redacted in a manner consistent with the Supreme Court's holding in *Gray*. Indeed, the Supreme Court has expressly rejected any suggestion that severance should be required in all cases where a co-defendant's confession is admitted into evidence. Recognizing the vital role of joint trials, particularly in conspiracy cases, the Court has observed:

> It would impair both the efficiency and the fairness of the criminal justice system to require, in all these cases of joint crimes where incriminating statements exist, that prosecutors bring separate proceedings, presenting the same evidence again and again, requiring victims and witnesses to repeat the inconvenience (and sometimes trauma) of testifying, and randomly favoring the last-tried defendants who have the advantage of [26] knowing the prosecution's case beforehand. Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessments of relative culpability – advantages which sometimes operate to the defendant's benefit. Even apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts.

Richardson v. Marsh, *supra* at 210 (footnote omitted).

Thus, the issue now before this Court essentially is whether the redaction of co-defendants Finney's and Womack's statements was sufficient to protect

defendant's confrontation rights as defined by the United States Supreme Court and whether defendant was prejudiced by the denial of his severance motion. *See Commonwealth v. Bond*, 539 Pa. 299, 313, 652 A.2d 308, 314-315 (1995); *Commonwealth v. Wharton*, 530 Pa. 127, 142, 607 A.2d 710, 717-718 (1992); *Commonwealth v. Chestnut*, 511 Pa. 169, 175, 512 A.2d 603, 606 (1986).

Here, the redacted statements of both co-defendant Finney and co-defendant Womack, primarily utilized neutral pronouns such as "we," "he," "they," "guy," "guys," "one," "everyone," "someone," "someone else," and "another" in place of the names of defendant and the other non-confessing co-defendants. At the pre-trial argument on his severance motion, defendant's claim of prejudice was based primarily on a portion of co-defendant Finney's statement which referred to defendant as the person who took the cash register from Lilly's Market (N.T. 8/14/95, 16-29). The redacted version of Finney's statement that was read into evidence at trial, however, replaced the specific reference to defendant's name with "**someone** grabbed the register and we all ran out" (N.T. 3/5/96, [27] 118). This redaction in no way facially incriminated defendant and is entirely consistent with *Gray*, and with this Court's prior decisions interpreting *Bruton*.

Defendant's theory that the jury could infer from the other evidence in the case who the redacted statements were referring to was not accepted by the Supreme Court in *Gray*, and has been specifically rejected by this Court. *See Commonwealth v. Chestnut*, *supra* at 173-174, 512 A.2d at 605 (noting that "[s]uch a rule would have the likely effect of making all statements by a co-defendant inadmissible,

regardless of whether they could be properly redacted"). Therefore, to the extent that the redactions of Finney's and Womack's statements merely substituted neutral pronouns like "someone" for the names of other participants in the crime, thereby giving no obvious indication of having been altered, there was no violation of defendant's Sixth Amendment right of confrontation and, thus, redaction was a permissible alternative to severance. This is so particularly in light of this Commonwealth's strong policy preference for joint trials of co-conspirators.

The inquiry cannot end here, however, as there were also a few instances in the redacted statements of Finney and Womack where the use of blank spaces were employed to replace the names of other participants in the crime. Nevertheless, to the extent that this may have violated defendant's Sixth Amendment rights as interpreted in *Gray*, any such error was clearly harmless under the facts of this case.

Both this Court and the United States Supreme Court have [28] consistently held that a *Bruton* violation is subject to a harmless error analysis. *See Brown v. United States*, 411 U.S. 223 (1973); *Schneble v. Florida*, 405 U.S. 427 (1972); *Harrington v. California*, 395 U.S. 250 (1969); *Commonwealth v. Anthony Washington*, *supra* at 26, 700 A.2d at 407; *Commonwealth v. Vinson Washington*, *supra* at 556-557, 692 A.2d at 1021; *Commonwealth v. Bond*, *supra* at 312, 652 A.2d at 314; *Commonwealth v. Wharton*, *supra* at 143-144, 607 A.2d at 718; *Commonwealth v. Chestnut*, *supra* at 174 -175, 512 A.2d at 605-606. "The harmless error rule derives from the notion that although an accused is entitled to a fair trial, he is not entitled to a perfect one." *Commonwealth v. Fewell*,

654 A.2d 1109, 1115 (Pa. Super. 1995). Thus, "[b]ased upon the circumstances of the case, a violation of a defendant's right to confront witnesses against him may constitute harmless error if the admission could not have influenced the outcome of the case." *Commonwealth v. Jones*, *supra* at 496, 668 A.2d at 506. *Accord United States v. Hickman*, 151 F. 3d 446, 458 (5th Cir. 1998) ("*Gray* does not undercut [prior] holding that *Bruton* error may be considered harmless when, disregarding the co-defendant's confession, there is otherwise ample evidence against a defendant"). Applying this standard to the instant case, it is clear that any *Bruton* violation that may have occurred here was harmless error.

First of all, this is not a case like *Gray*, where immediately after introducing the co-defendant's redacted statement, the prosecutor asked the detective who read the statement to the jury whether the appellant was arrested after the co-defendant made his [29] statement. In the instant case, there was no similar attempt made by the prosecutor to undo the redaction of Finney's and Womack's statements.[14]

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[14] Defendant does assert that the prosecutor, in her closing argument, pointed at him and his co-defendants and said that the statements of Finney and Womack corroborated their guilt. The record, however, as was properly determined by Superior Court, simply does not support this contention.

Instantly, the prosecutor's comments about the confessions of Womack and Finney were as follows:

> Now, you know also by another piece of evidence that there has been an agreement, that there was going to be a robbery, because what Atil Finney says in his statement is he agreed with the **others** to get paid. When he was in that car with the **other people**. He agreed to get paid.

[30] In addition, none of the few blank spaces in Finney's and Womack's statements obviously referred to defendant and, indeed, some obviously referred to other participants who could not have been defendant. For example, defendant points to a portion of

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> That's another piece of evidence that the group had planned to in fact commit this robbery. . .
>
> [A]nd remember, that in Womack – in Defendant Womack's statement he in fact said they go over to the grocery store.

N.T. 3/8/96, 64-67 (emphasis added). At no point does the prosecutor mention the name of defendant in connection with Finney's or Womack's statement. Rather, consistently with the manner in which these statements were redacted, the prosecutor used the words "others," "other people," and "they." Thus, the prosecutor in no way suggested that the jury should use Finney's and Womack's statements as evidence against defendant. The argument fully complied with the dictates of *Gray*.

Under similar circumstances, this Court rejected a claim that a prosecutor had "broken redaction" during closing argument by using the word "they" while discussing the co-defendant's confession. *See Commonwealth v. Vinson Washington*, *supra* at 558, 692 A.2d at 1021-1022. This Court dismissed the claim as follows:

> Appellant contends that the prosecutor's use of the word "they" was an improper reference to Appellant, tying him in to [the co-defendant's] statement. We disagree. The use of the pronoun "they" was indicative of nothing more than the fact that [the co-defendant's] statement spoke of two men, [the co-defendant] and the "guy" with him. [30] As such, the prosecutor's remark was insufficient to prejudice the jury against Appellant.

Id. The same rationale is clearly applicable in the instant case where the prosecutor's remarks did nothing more than mirror the redacted statements of Finney and Womack that multiple actors were involved. Nothing in the prosecutor's comments improperly violated the redaction of either Womack's or Finney's confessions.

Womack's redacted statement in which the person who shot and killed the victim is identified as "blank." N.T. 3/6/96, 38. Defendant fails to explain, however, how this prejudiced him, as all of the other evidence in the case clearly identified the shooter – identified in the statement as "blank" – as co-defendant Julius Jenkins. Thus, if the jury were to draw any conclusion as to who was identified as "blank" in Womack's statement, the only conceivable determination would have been Jenkins, the sole shooter – and not defendant.

Most of the other "blanks" in the redacted statements, while indicating some alteration of the statements was made, give absolutely no hint as to whose name was replaced with a "blank," even when considered in context with the other evidence in the case. In this regard, this case is clearly distinguishable from *Gray v. Maryland*, which involved a joint trial of only two co-defendants. Thus, in *Gray* the blank spaces and references to [31] "deleted" in the co-defendant's redacted statement obviously referred to Gray since he was the only other defendant on trial. Here, by contrast, each reference to "blank" in Finney's or Womack's statements could have referred to any of the other four co-defendants on trial. Thus, there is no basis to assume that the jury would have concluded in this five co-defendant trial that defendant was the individual referred to as "blank" in either Womack's or Finney's statements. Even if the jury had disregarded the court's instructions to consider Finney's and Womack's statements as evidence only against the co-defendant making the statement, therefore, defendant was not prejudiced by such error.

That is particularly clear, considering that there was ample independent evidence establishing

defendant's guilt. The testimony of Demond Jackson clearly linked defendant to the robbery and murder at Lilly's Market wholly apart from the statements of Finney and Womack. Jackson witnessed defendant's entry into the market with three of his co-defendants and his return to the car after the gunfire inside, carrying the store's cash register. Defendant's association with his co-conspirators, moreover, was further independently established by the evidence regarding their subsequent presence at the Ace Check Cashing Agency three days later using the same car and same gun used in the crimes at Lilly's Market. Thus, even if the jury had disregarded the trial court's instructions not to use Finney's and Womack's statements as evidence against him, there was nevertheless ample other evidence that was properly admitted which independently established [32] defendant's guilt of the charged crimes.

Accordingly, under all of these circumstances, even if defendant's Sixth Amendment rights were violated, any hindsight error on the part of the trial court in denying his severance motion was harmless. The judgments of sentence should be affirmed.

[33]

CONCLUSION

For the foregoing reasons, the Commonwealth respectfully requests that this Court affirm the judgments of sentence.

Respectfully submitted,

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* * * *

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellee, v. JARMAINE Q. TRICE, Appellant. APR 29 1999 APPEALS UNIT	31 E.D. Appeal Dkt. 1998 Appeal from the Judgment of the Superior Court entered on December 16, 1997 at 1829 PHL 1996 affirming the Judgment of Sentence entered on May 13, 1996, in the Court of Common Pleas, Philadelphia County, Criminal Division at No. 118 June Term, 1995

ORDER

PER CURIAM: **DECIDED: April 29, 1999**

Appeal dismissed as having been improvidently granted.

Judgment entered

Patricia Johnson
Patricia Johnson
Chief Clerk

PETITIONER'S BRIEF

RECORD AND BRIEFS

Supreme Court, U.S.
FILED
JUN 17 2011

No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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QUESTION PRESENTED

For purposes of adjudicating a state prisoner's petition for federal habeas relief, what is the temporal cutoff for whether a decision from this Court qualifies as "clearly established Federal law" under 28 U.S.C. § 2254(d), as amended by the Antiterrorism and Effective Death Penalty Act of 1996?

TABLE OF CONTENTS

QUESTION PRESENTED i
TABLE OF AUTHORITIES iv
BRIEF FOR THE PETITIONER 1
OPINIONS BELOW 1
JURISDICTION 1
RELEVANT STATUTORY PROVISIONS 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 10
ARGUMENT 14
I. Federal Habeas Petitioners Are Entitled To Rely On Decisions From This Court That Came Down Before Their Convictions Became Final 15
A. Statutory Interpretation Principles Dictate That Any Decision Predating Finality Qualifies As Clearly Established Federal Law Under AEDPA 16
B. Setting The Cutoff At The Date Of The Last State-Court Decision On The Merits Would Create Numerous Practical And Constitutional Problems 36
II. At The Very Least, A Federal Habeas Petitioner Should Be Entitled To Rely On A Decision From This Court That Was Announced Before A State Supreme Court Disposed Of His Cases On Direct Review 44

A. The Comity Interests Underlying Federal Habeas Review Of State Convictions Require Only That State Courts Have A Fair Opportunity On Direct Review To Apply This Court's Decisions 44

B. This Rule Is Compatible With The Text Of Section 2254(d) 48

CONCLUSION 49

STATUTORY APPENDIX 1a

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Holland, 330 F.3d 398 (6th Cir. 2003) 36

Banks v. Horn, 271 F.3d 527 (3d Cir. 2001) 24

Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp., 522 U.S. 192 (1997) 27

Belton v. Blaisdell, 559 F. Supp. 2d 128 (D.N.H. 2008) 30, 35

Branch v. Turner, 37 F.3d 371 (8th Cir. 1994) 21

Brecht v. Abrahamson, 507 U.S. 619 (1993) 19

Brown v. Allen, 344 U.S. 443 (1953) 21

Bruton v. United States, 391 U.S. 123 (1968) 3, 4, 5, 6

C.N. v. Willmar Pub. Schs., 591 F.3d 624 (8th Cir. 2010) 36

Cage v. Louisiana, 498 U.S. 39 (1990) 26

Carey v. Musladin, 549 U.S. 70 (2006) 31, 33

Caspari v. Bohlen, 510 U.S. 383 (1994) 18, 19, 20, 34

Chisom v. Roemer, 501 U.S. 380 (1991) 17, 29

Coleman v. Thompson, 501 U.S. 722 (1991) 39

Commonwealth v. Miles, 681 A.2d 1295 (Pa. 1996) 4

Commonwealth v. Trice, 552 Pa. 201 (1998) 5

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) ... passim

Cvijetinovic v. Eberlin, 617 F. Supp. 2d 620 (N.D. Ohio 2008), *rev'd on other grounds*, 617 F.3d 833 (6th Cir. 2010) 30, 35

Daly v. Burt, 613 F. Supp. 2d 916 (E.D. Mich. 2009) 30, 35

Danforth v. Minnesota, 552 U.S. 264 (2008) 18, 22

Dep't of Commerce v. U.S. House of Representatives, 525 U.S. 316 (1999) 29

Deputy v. Taylor, 19 F.3d 1485 (3d Cir. 1994) 20

Dir. of Revenue v. CoBank ACB, 531 U.S. 316 (2001) 17

Douglas v. California, 372 U.S. 353 (1963) 41

Dye v. Hofbauer, 546 U.S. 1 (2005) 46

Early v. Packer, 537 U.S. 3 (2002) 12, 24, 34

Ex parte Hawk, 321 U.S. 114 (1944) 46

Fay v. Noia, 372 U.S. 391 (1963) 21

Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2009) 30, 37

Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) 21

Gerrard v. Parrish, 2007 WL 151729 (D.N.J. Jan. 17, 2007) 30, 35

Gray v. Maryland, 523 U.S. 185 (1998) ..... passim

Gray v. Netherland, 518 U.S. 152 (1996) 32

Griffith v. Kentucky, 479 U.S. 314 (1987) ..... passim

Halbert v. Michigan, 545 U.S. 605 (2005) .. 41, 42, 43

Harrington v. Richter, 131 S. Ct. 770 (2011) .. passim

Holland v. Florida, 130 S. Ct. 2549 (2010) 17

Horn v. Banks, 536 U.S. 266 (2002)..... 11, 24, 25, 44

House v. Bell, 547 U.S. 518 (2006)..... 14, 17

INS v. St. Cyr, 533 U.S. 289 (2001) 43

Jimenez v. Quarterman, 129 S. Ct. 681 (2009) 27, 46

Johnson v. Texas, 509 U.S. 350 (1993) 19

Jones v. Gomez, 66 F.3d 199 (9th Cir. 1995) 20

Khan v. Fischer, 583 F. Supp. 2d 390 (E.D.N.Y. 2008)..... 30, 35

Kimmelman v. Morrison, 477 U.S. 365 (1986) 43

Lawrence v. Chater, 516 U.S. 163 (1996) 40, 41

Lingle v. Chevron U.S.A., 544 U.S. 528 (2005)..... 34

Lockhart v. Fretwell, 506 U.S. 364 (1993)..... 32

Lockyer v. Andrade, 538 U.S. 63 (2003) 33

Lyons v. Weisner, 247 Fed. App'x 440 (4th Cir. 2007) 30, 35

Mackey v. United States, 401 U.S. 667 (1971) 19

Merrill Lynch v. Curran, 456 U.S. 353 (1982).. 16, 22

Miller v. Fenton, 474 U.S. 104 (1985)..... 21

Mills v. Maryland, 486 U.S. 367 (1988) 24, 35

Motley v. Collins, 18 F.3d 1223 (5th Cir. 1994)..... 20

O'Sullivan v. Boerckel, 526 U.S. 838 (1999) 37, 46, 47

Pennsylvania v. Finley, 481 U.S. 551 (1987)..... 39

Powell v. Nevada, 511 U.S. 79 (1994) 36, 49

Rickman v. Bell, 131 F.3d 1150 (6th Cir. 1997) 21

Rodriquez v. United States, 395 U.S. 327 (1969) 43

Roe v. Flores-Ortega, 528 U.S. 470 (2000) 43

Rogers v. Hauck, 2009 WL 3584923 (D.N.J. Oct. 26, 2009) 30, 35

Rose v. Lundy, 455 U.S. 509 (1982) 45, 48

Ross v. Moffitt, 417 U.S. 600 (1974) 37, 42

Saffle v. Parks, 494 U.S. 484 (1990) 32

Slack v. McDaniel, 529 U.S. 473 (2000) 14

Smith v. Spisak, 130 S. Ct. 676 (2010) 30, 31, 35

Spencer v. Georgia, 500 U.S. 960 (1991) 38

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 16, 17

Strickland v. Washington, 466 U.S. 668 (1984) 33

Teague v. Lane, 489 U.S. 288 (1989) ..... passim

Thomas v. State, 298 S.W.3d 610 (Tenn. Crim. App. 2009) 40

Thompson v. Runnel, 621 F.3d 1007 (9th Cir. 2010) 30, 35

Townsend v. Sain, 372 U.S. 293 (1963) 21

Tyler v. Cain, 533 U.S. 656 (2001) 26

United States v. O'Brien, 130 S. Ct. 2169 (2010) 16, 17

Wainwright v. Sykes, 433 U.S. 72 (1977) 49

Walton v. Caspari, 916 F.2d 1352 (8th Cir. 1990) 21

Whorton v. Bockting, 549 U.S. 406 (2007) 18

Wiggins v. Smith, 539 U.S. 510 (2003) 33

Williams v. Taylor, 529 U.S. 362 (2000) ..... passim
Wright v. West, 505 U.S. 277 (1992)..... passim
Yarborough v. Alvarado, 541 U.S. 652 (2004) 33

Statutes

28 U.S.C. § 1254(1) 1
28 U.S.C. § 1257(a) 42
28 U.S.C. § 2243..... 1, 18, 21, 22
28 U.S.C. § 2244(b) 14
28 U.S.C. § 2244(d)(1)..... 14, 26
28 U.S.C. § 2244(d)(2)..... 27
28 U.S.C. § 2254..... passim
28 U.S.C. § 2254(b) 14
Ala. R. Crim. P. 32.2(a)(2) 40
24 Pa. Code § 122(B)(2), Comment (2000) 6, 41

Legislative History

H.R. 3371, 102d Cong. (1991)..... 28
H.R. 4018, 103d Cong. (1994)..... 28
H.R. 5269, 101st Cong. (1990)..... 28
H.R. REP. NO. 102-242 (1991) 28
H.R. REP. NO. 103-470 (1994)..... 28
H.R. REP. NO. 104-518 (1996) (Conf. Rep.)..... 28
142 CONG. REC. H2247 (Mar. 14, 1996) 29
142 CONG. REC. H3599 (Apr. 18, 1996) 28, 29
142 CONG. REC. S3427 (Apr. 17, 1996)..... 29

BRIEF FOR PETITIONER

Petitioner Eric Greene respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 1a) is published at 606 F.3d 85. The opinion of the United States District Court for the Eastern District of Pennsylvania (Pet. App. 72a) is published at 482 F. Supp. 2d 624.

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2010, and subsequently amended on July 22, 2010. A timely petition for rehearing en banc was denied on July 20, 2010. Pet. App. 83a-84a. On October 2, 2010, Justice Alito extended the filing deadline for filing a petition for a writ of certiorari to and including November 17, 2010. No. 10A350. This Court granted the petition for a writ of certiorari on April 4, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant provisions of the federal habeas statute are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Roughly a quarter century ago, following two previous decades of internal debate and deliberation, this Court established a system of retroactivity with respect to criminal defendants convicted in state courts. Under that system, state prisoners are entitled to the benefit of any decision from this Court announced while on direct review, but generally not after their convictions have become final. This finality cutoff has become a bedrock principle for both direct appeals, *see Griffith v. Kentucky*, 479 U.S. 314 (1987), and federal habeas review, *see Teague v. Lane*, 489 U.S. 288 (1989), creating stability and fairness in retroactivity law where they previously were lacking. The question presented here is whether Congress – without saying so directly, and while focused on a different matter (the standard of review applicable on federal habeas) – partially altered this retroactivity doctrine in the Antiterrorism and Effective Death Penalty Act (AEDPA). In particular, the question is whether AEDPA implicitly deprives state prisoners of their former entitlement to obtain habeas relief based on violations of this Court's cases decided while they were on direct review but after the last state-court decisions rejecting their claims on the merits.

1. In early 1993, a group of men robbed a grocery store in Philadelphia. One of them shot the store's owner, who died shortly afterwards. The men took the store's cash register with them.

Over the next several months, the police questioned petitioner Eric Greene and a number of other men (some of whom had been arrested in

connection with another robbery) about the grocery store incident. Petitioner denied any involvement, but the police obtained confessions from three other men. All three identified Julius Jenkins as the shooter and claimed that petitioner was one of the participants. But their accounts diverged from there. According to one man, petitioner was involved in the robbery but remained in the car the entire time. Another man said petitioner carried the cash register out of the store. This man later amended his statement to change the number of people involved in the robbery from five to six. A third implicated petitioner in the robbery but did not describe petitioner's role.

The Commonwealth of Pennsylvania charged petitioner and three other men with, among other things, second-degree murder, three counts of robbery, and conspiracy. The Commonwealth also charged Julius Jenkins with first-degree murder. The Commonwealth proposed a joint trial for all five accused men.

When it became clear that the codefendants who had given statements implicating petitioner in the crimes were not going to testify, petitioner moved to sever his trial from theirs. In support of this motion, petitioner pointed out that the Confrontation Clause, as explicated in *Bruton v. United States*, 391 U.S. 123 (1968), prohibits the prosecution from introducing a nontestifying defendant's confession in a joint trial with a codefendant whom the confession also implicates. Instead of severing the trials, however, the court asked the Commonwealth to redact the codefendants' statements to remove the prejudicial references to petitioner.

The Commonwealth accordingly redacted the statements – but only barely. In some places, the Commonwealth redacted the statements to replace petitioner's name and those of other defendants with neutral pronouns and phrases like "this guy" and "these guys." Pet. App. 7a-8a. In other places, the Commonwealth simply deleted or replaced petitioner's name with the word "blank" or "similar symbols," making it obvious that redactions had occurred. *Id.* at 9a, 78a. The trial court nonetheless accepted these redactions and ruled that they cured the *Bruton* problem because the confessions no longer explicitly referred to petitioner by name.

At the joint trial, petitioner's codefendants did not testify, and the Commonwealth introduced their redacted confessions against them. The jury found petitioner guilty, and the court sentenced him to life imprisonment. Pet. App. 9a.

2. Petitioner appealed his conviction to the Pennsylvania Superior Court. Among other arguments, he renewed his Confrontation Clause claim, arguing that the *Bruton* doctrine is violated when "redaction would destroy the narrative integrity of the [codefendants'] statements, and prejudice the appellant in the case at bar," and he contended that he "did suffer such prejudice at trial." JA. 51-52.

The Pennsylvania Superior Court affirmed. Relying on the Pennsylvania Supreme Court's prior holding in *Commonwealth v. Miles*, 681 A.2d 1295, 1300 (Pa. 1996), that "the substitution of the letter 'X' for a defendant's name does not violate that defendant's *Bruton* rights," the Superior Court ruled that petitioners' codefendants' confessions as

redacted did not violate the Confrontation Clause because they were "redacted to eliminate specific reference to [petitioner] and the others." J.A. 128.

3. Petitioner then filed a timely petition for allowance of appeal with the Pennsylvania Supreme Court, again pressing his Confrontation Clause claim. While his petition was pending, this Court decided *Gray v. Maryland*, 523 U.S. 185 (1998). In *Gray*, this Court considered a *Bruton* challenge to the admission of a codefendant's confession that – just as in this case – had been redacted to replace the defendant's name in various places with blanks and words signaling obvious deletions. This Court held that "considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton*'s unredacted confessions as to warrant the same legal results." *Gray*, 523 U.S. at 195. Because *Gray* was decided before petitioner's conviction became final on direct review, it applied to his case under this Court's decision in *Griffith v. Kentucky*, 479 U.S. 314 (1987).

The Pennsylvania Supreme Court then granted the petition for allowance of appeal limited to the Confrontation Clause issue. J.A. 156.[1] Petitioner filed a brief explaining that the "redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster," and that "*Gray v.*

---

[1] The Pennsylvania Supreme Court order is styled *Commonwealth v. Trice*, 552 Pa. 201 (1998). Petitioner is also known as Jarmaine Q. Trice, and he was referred to by this name in the state-court proceedings.

Maryland (page number will not be assigned for another year and, hence, this U.S. citation will be omitted *infra*), 118 S. Ct. 1151, 140 L. Ed. 2d 294 (1998), prohibits what transpired herein and absolutely mandates a new trial." J.A. 171. Several months later, however, the Pennsylvania Supreme Court dismissed petitioner's appeal "as having been improvidently granted." J.A. 216. The court offered no explanation for its dismissal.

Following the Pennsylvania Supreme Court's dismissal, petitioner's appointed attorney mailed him a letter advising him that his representation was at an end. *See* 24 Pa. Code § 122(B)(2), Comment (2000) (indigent defense appointments run "through the Supreme Court of Pennsylvania").

4. Later that year, the time for filing a petition for certiorari to this Court expired and petitioner's conviction became final. Pet. App. 10a-11a.

5. After unsuccessful state post-conviction proceedings, petitioner filed a timely petition for federal habeas relief in the United States District Court for the Eastern District of Pennsylvania. He sought relief on several grounds, including the constitutional principles set forth in *Bruton* and *Gray*.

Section 2254(d) of Title 28 of the U.S. Code, as amended by the Antiterrorism and Effective Death Penalty Act (AEDPA), provides that habeas relief is available when a state court's adjudication of a federal constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States." 28 U.S.C. § 2254(d)(1). There can be no serious dispute that the Pennsylvania courts' adjudication of petitioner's Confrontation Clause claim was "contrary to" *Gray*. As the district court noted, the prosecution in petitioner's trial, just as in *Gray*, introduced codefendants' confessions that included "blank spaces and similar symbols of deletion." *Id.* at 78a. Yet, unlike *Gray*, the Pennsylvania courts held that such obvious redactions satisfied the Confrontation Clause.

The district court thus observed that the "key to assessing the merits of Petitioner's claim" is retroactivity law. Under the retroactivity doctrine established in *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, a state prisoner seeking federal habeas relief is entitled to the benefit of any decision that applied to him under *Griffith* – that is, any decision that predated the finality of his conviction. If *Teague* continues to control, then *Gray*'s prohibition on obvious redactions applies to petitioner's case. But if Section 2254(d)'s phrase "clearly established Federal law" partially abrogated *Teague* and creates a new retroactivity cutoff at the last state-court decision on the merits, then *Gray* does not apply here because it was announced after the intermediate appellate decision from the Pennsylvania Superior Court.

Adopting a magistrate's report and recommendation, the district court held that Section 2254(d) sets the retroactivity cutoff at the last state-court decision on the merits. Pet. App. 78a. Freed from having to apply *Gray* to petitioner's case, the district court held that the Pennsylvania Superior Court's adjudication of petitioner's Confrontation

Clause claim was not contrary to this Court's precedent at the time of its decision. *Id.* at 74a-75a. It also rejected the remainder of petitioner's claims.

The district court granted petitioner a certificate of appealability limited to his Confrontation Clause claim. *Id.* at 78a-79a.

6. A divided panel of the Third Circuit affirmed. The majority acknowledged that "Greene's petition turns on whether he may invoke *Gray*," Pet. App. 23a, and that AEDPA contains "no clear answer" to that retroactivity issue, *id.* at 21a n.7. The majority nonetheless held that AEDPA abrogated *Teague*'s finality cutoff, such that "the date of the relevant state-court decision is [now] the controlling date." *Id.* at 18a. The "most straightforward" reading of the "clearly established" language in Section 2254(d), the majority asserted, is that it "contemplates that the law or precedent *existed* at the time of the state court's substantive resolution of the petitioner's claim." *Id.* at 25a.

The majority also claimed to find support for this holding in this Court's precedent – specifically, in this Court's statement in *Williams v. Taylor*, 529 U.S. 362 (2000), that "clearly established Federal law" "refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412. The Third Circuit acknowledged that two other passages in *Williams* "direct[ly]" state that *Teague*'s retroactivity cutoff remains controlling. Pet. App. 18-19a, 22a, 29a (citing *Williams*, 529 U.S. at 390, 412). The court of appeals also acknowledged that this Court recently deemed the issue an open question because neither *Williams* nor any subsequent case required this

Court to resolve the issue. Pet. App. 23a (citing *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010)). But the Third Circuit opted to follow the dicta in *Williams* referencing "the time of the relevant state-court decision," on the ground that this Court has repeated this language in post-*Williams* cases more often than it has cited the *Teague*-related passages from that decision. *Id.* at 25a-28a.

Judge Ambro dissented. Like the majority, he started from the premise that Section 2254(d) does not contain "an express time cutoff for 'clearly established Federal law.'" Pet. App. 48a. Judge Ambro also noted that passages in *Williams* are "conflicting," and that "[i]n none of the [post-*Williams*] cases cited by the majority . . . was the Supreme Court required to determine the cutoff date." *Id.* at 51a n.7. In light of these realities and in the absence of any other "clear" directive in AEDPA to abandon the *Teague* doctrine, Judge Ambro deduced that "[i]t is the Supreme Court's retroactivity jurisprudence of *Griffith* or *Teague* that determines applicability on collateral review, not AEDPA." *Id.* at 61a. Section 2254(d)'s "clearly established" phrase, on his reading of the statute, merely requires federal court to apply holdings, instead of dicta, to habeas petitions.

Judge Ambro also objected that the majority's new temporal cutoff would create a "twilight zone" of arbitrariness for criminal defendants in state court. Pet. App. 62a. While *Teague*'s finality rule minimizes disparate treatment of similarly situated prisoners, outcomes under the majority's rule would be haphazard, depending on whether a state supreme court decided to exercise discretionary authority to

hear a case implicating a new decision from this Court. Under such a regime, Judge Ambro explained, some state prisoners inevitably would be "unfairly treated relative to other similarly situated individuals who were lucky enough to have the state courts apply the new rule." *Id.* at 68a.

7. Petitioner filed a timely petition for rehearing en banc. Pet. App. 83a-84a. The Third Circuit denied the petition, with Judge Ambro noting that he would have granted rehearing. *Id.* This Court granted certiorari. 131 S. Ct. 1813 (2011).

SUMMARY OF ARGUMENT

A holding from this Court announced after a state intermediate court decision denying relief on direct review, but before a state supreme court's denial of discretionary review, qualifies as "clearly established Federal law" for purposes of applying 28 U.S.C. § 2254(d).

I. A state prisoner seeking federal habeas relief is entitled to the benefit of any case that this Court decided before his conviction became final.

A. This Court has repeatedly held that statutory amendments, including those in AEDPA, do not change prior law unless there is a specific or clear indication to the contrary in the amendments' text, structure, or legislative history. Prior to AEDPA, this Court construed the federal habeas statute in *Teague v. Lane*, 489 U.S. 288 (1989), to allow a state prisoner seeking federal habeas relief to rely on any case that this Court decided before his conviction became final. Nothing in the text of revised Section 2254 evinces a clear indication to depart from

Teague's retroactivity cutoff. Section 2254(d)(1) alters the *standard of review* applicable on federal habeas; it replaces the prior system of independent review with one requiring deference, and its "clearly established" phrase abrogates federal courts' previous practice of granting relief based on prior dicta instead of holdings. But, as this Court has emphasized both before and after AEDPA, the issue of what standard of review applies in federal habeas proceedings is separate and distinct from the issue of retroactivity. *See, e.g.*, *Wright v. West*, 505 U.S. 277, 308 (1992) (Kennedy, J., concurring in the judgment); *id.* at 303-04 (O'Connor, J., concurring in the judgment); *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam). And nothing in the language of Section 2254(d) deals with retroactivity law. The amended statute's structure and AEDPA's legislative history likewise confirm that Section 2254(d) addresses only the standard of review. To the extent that Congress thought about retroactivity law at all in amending the federal habeas statute, Congress expected *Teague*'s regime to continue to control all retroactivity determinations.

The Third Circuit nevertheless advanced two arguments for holding that a decision predating finality but postdating the last state-court decision on the merits does not qualify as "clearly established" law under Section 2254(d). Neither one satisfies the "clear indication" test – or even withstands scrutiny on its own terms.

First, the Third Circuit asserted that, "[a]s an inferior federal court, [it was] not free to ignore" several previous opinions from this Court repeating Justice O'Connor's statement in dicta in *Williams v. Taylor*, 529 U.S. 362 (2000), that "clearly established

Federal law" "refers to the holdings as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." Pet. App. 18a, 25a-27a (emphasis added by Third Circuit) (quoting *Williams*, 529 U.S. at 412). But none of the cases the Third Circuit cited raised the question presented here, and the *Williams* opinion as a whole actually supports the notion that *Teague*'s finality cutoff still controls retroactivity determinations.

Second, the Third Circuit asserted that a federal court cannot sensibly apply Section 2254(d)'s rule of deference to a constitutional claim based on "a Supreme Court decision that did not exist" at the time of the relevant state-court decision. Pet. App. 25a. But this Court has already held in *Harrington v. Richter*, 131 S. Ct. 770 (2011), and *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), that federal courts can and should apply Section 2254(d) even when the relevant state-court decision did not apply, cite, or exhibit awareness of an applicable decision from this Court. In such a situation, a federal habeas court "must determine what arguments or theories" based on the applicable decision "*could have* supported[] the state court's decision," and then apply AEDPA's deferential standard to that hypothetical opinion. *Richter*, 131 S. Ct. at 786 (emphasis added). The same method of analysis pertains here.

B. Changing the retroactivity cutoff from finality to the date of the last state-court decision on the merits would create serious practical and constitutional problems. For starters, it would create a "twilight zone" during direct review. State prisoners' ability to seek federal habeas relief based on decisions announced after state intermediate court

decisions would depend on the happenstance of whether state supreme courts decide to grant discretionary review in their cases and issue decisions on the merits. Creating a prefinality cutoff would also greatly increase the pressure and importance of this Court's GVR practice – seemingly even requiring, under this Court's right-to-counsel jurisprudence, the appointment of an attorney when a GVR is a possibility. The difficulty of navigating these various issues underscores the wisdom of leaving *Teague*'s settled regime in place in the absence of any clear congressional directive to the contrary.

II. Even if Section 2254(d)'s phrase "clearly established Federal law" does contain a new retroactivity rule that is keyed to when the state courts decided the prisoner's claim, that rule should be satisfied when the decision from this Court on which the prisoner seeks to rely was announced before the state high court disposed of his case on direct review. The most that Congress could plausibly have intended to accomplish in AEDPA would have been to ensure that state courts always have a fair opportunity to apply this Court's decisions before prisoners seek federal habeas relief based upon them. Where, as here, a prisoner argued to the state supreme court that he was entitled to relief under a decision from this Court and the state court elected to forego review, such a "fair opportunity" requirement is satisfied.

ARGUMENT

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) was the culmination of a thorough reexamination of federal habeas law – both of prior statutes on the topic and of this Court's jurisprudence fleshing out those statutes. In some instances, AEDPA changed previous law. *See, e.g.*, 28 U.S.C. § 2244(d)(1) (new one-year limitations period); *id.* § 2253(c) (new certificate-of-appealability requirement for taking appeals). In other instances, AEDPA codified or incorporated this Court's jurisprudence. *See, e.g.*, 28 U.S.C. § 2254(b) (exhaustion requirement); *Slack v. McDaniel*, 529 U.S. 473, 483, 486 (2000) (holding that 28 U.S.C. § 2244(b) incorporates pre-AEDPA conception of "second or successive" petition). In still other instances, AEDPA is silent on a topic, thus leaving this Court's pre-AEDPA jurisprudence intact. *See, e.g.*, *House v. Bell*, 547 U.S. 518, 536-39 (2006) (procedural default doctrine and its exceptions).

As is relevant to this case, AEDPA amended 28 U.S.C. § 2254 in order to change the standard of review that applies when a federal habeas court reviews a constitutional claim attacking a state-court judgment. Whereas Section 2254 used to provide for de novo review of such judgments (and allowed federal courts to consider dicta and lower court opinions in conducting such review), new Section 2254(d) now provides that a state prisoner may not obtain habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

The Third Circuit held in this case that this amendment also altered longstanding retroactivity law – rendering state prisoners no longer entitled to obtain relief based on decisions from this Court issued before their convictions became final but after the last state-court decision on the merits. This holding is incorrect. AEDPA did not supplant finality cutoff established in *Teague v. Lane*, 489 U.S. 288 (1989), so any decision from this Court that predates finality qualifies as "clearly established Federal law" for purposes of Section 2254(d). And even if AEDPA had changed retroactivity law, a state prisoner would still be entitled to the benefit of a decision that, as here, predated a state high court's disposal of the case.

I. Federal Habeas Petitioners Are Entitled To Rely On Decisions From This Court That Came Down Before Their Convictions Became Final.

Well-settled principles of statutory interpretation dictate that *Teague*'s finality cutoff continues to control retroactivity law in the post-AEDPA landscape. What is more, moving the cutoff to the last state-court decision on the merits would create serious practical and constitutional problems that there is no reason to believe Congress wished to force upon this Court.

A. Statutory Interpretation Principles Dictate That Any Decision Predating Finality Qualifies As Clearly Established Federal Law Under AEDPA.

Congress frequently amends parts of federal statutes. In order to foster stability in the law, therefore, this Court assumes that amendments do not alter previous judicial constructions of a statutory regime absent a "specific," *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), or "clear" indication to the contrary in the new statute's text, structure, or legislative history, *United States v. O'Brien*, 130 S. Ct. 2169, 2179-80 (2010) (quoting *Grogan v. Garner*, 498 U.S. 279, 290 (1991)).

Two cases illustrate this principle at work. In *Merrill Lynch v. Curran*, 456 U.S. 353 (1982), this Court held that amendments to the Commodity Exchange Act (CEA) did not disturb the availability of a certain private right of action under the statute because "a comprehensive reexamination and significant amendment of the CEA left intact the statutory provisions" from which the federal courts had derived the doctrine. *Id.* at 381-82. Similarly, in *Square D*, this Court assumed that "Congress did not see fit to change" this Court's prior interpretation of a statutory exemption from the Sherman Act's treble damages remedy after "Congress carefully reexamined this area of the law" and enacted new, express exemptions shielding certain activities from antitrust liability. 476 U.S. at 420. In concluding that Congress had left the original treble damages exemption intact, the Court noted the absence of any "specific statutory provision or legislative history indicating a specific congressional intention to

overturn the [Court's] longstanding . . . construction" of the original exemption. *Id.*

In numerous other cases, including two involving AEDPA itself, this Court has invoked this presumption of continuity to hold that statutory amendments did not change this Court's prior interpretation of a statutory regime. *See Holland v. Florida*, 130 S. Ct. 2549, 2561-62 (2010) (categorical rules in AEDPA's statutory limitations provision did not abolish equitable tolling because "prior law" allowed such tolling and the amendments were "silent as to equitable tolling"); *O'Brien*, 130 S. Ct. at 2178 (amendments to criminal statute did not convert a subsection from an element to a sentencing factor because there was no "clear indication" of such intent (quoting *Grogan*, 498 U.S. at 290)); *House*, 547 U.S. at 536-39 (2006) (AEDPA did not alter procedural default doctrine); *Dir. of Revenue v. CoBank ACB*, 531 U.S. 316, 323 (2001) (amendment did not alter prior law because "[n]othing in the [amendments] expressly change[d]" such law); *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[I]f Congress had . . . inten[ded]" to change the law in a certain manner, "Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the . . . legislative history" of the amendment). In short, when confronting an amended statute, "the applicable principle is that Congress does not enact substantive changes *sub silentio*." *O'Brien*, 130 S. Ct. at 2178.

Applying this analytical framework here, it is apparent that AEDPA did not alter retroactivity law: this Court squarely construed the habeas statute

before AEDPA to set finality as the cutoff, and nothing in AEDPA clearly indicates that Congress intended to alter that rule.

1. This Court's pre-AEDPA law established finality as the retroactivity cutoff and – equally important – emphasized that retroactivity law was distinct from the standard-of-review issue Congress later specifically addressed in AEDPA's amendment to Section 2254.

Two important matters arise when a federal habeas court reviews a state-court criminal conviction: retroactivity and the standard of review. Retroactivity is a "threshold" issue that determines what law is applicable on federal habeas review. *See Caspari v. Bohlen*, 510 U.S. 383, 389 (1994); *Teague*, 489 U.S. at 300. The standard of review determines how, in light of the temporally applicable law, to assess the legitimacy of the state court's judgment. *See Williams v. Taylor*, 529 U.S. 362, 400-03 (2000); *Wright v. West*, 505 U.S. 277, 306 (1992) (Kennedy, J., concurring in the judgment).

In the *Teague* decision in 1989, this Court derived the doctrine of retroactivity on habeas from its grant of authority in 28 U.S.C. § 2243, which provided then, as now, that federal courts may issue habeas relief "as law and justice require." *See Danforth v. Minnesota*, 552 U.S. 264, 278 (2008) (describing statutory derivation of retroactivity doctrine). Specifically, this Court held that state prisoners are entitled to the benefit of any Supreme Court decision that came down before their convictions became final. Any such decision, in *Teague*'s retroactivity parlance, is an "old rule." *Whorton v. Bockting*, 549 U.S. 406, 414 (2007).

Prisoners may not, however, benefit from postfinality decisions – termed "new rules," *Teague*, 489 U.S. at 310 – unless they announce "watershed rules of criminal procedure." *Id.* at 311. As Justice Kennedy has explained, the *Teague* doctrine thus serves a "comity interest . . . in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought to be correct but now understood to be deficient." *Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment); *accord Teague*, 489 U.S. at 308.

Teague's cutoff of "finality" was carefully conceived and is precisely defined. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari*, 510 U.S. at 390; *accord Griffith v. Kentucky*, 479 U.S. 314, 321 n.6 (1987). At that point, but not before, a state's interest in "leaving concluded litigation in a state of repose" overrides a defendant's competing interest in obtaining a trial that comports with constitutional requirements. *Teague*, 489 U.S. at 306 (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (Harlan, J., concurring in judgments in part and dissenting in part)); *see also Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (state interest in repose attaches once convictions have "survived direct review"); *Johnson v. Texas*, 509 U.S. 350, 378 (1993) (O'Connor, J., dissenting) (state interest in repose "come[s] into play only after this Court has denied certiorari or the time

for filing a petition for certiorari from the judgment affirming the conviction has expired").

Accordingly, in a case such as this, in which this Court announces a pertinent decision *before* "the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied," *Caspari*, 510 U.S. at 390, but after the last state-court decision on the merits, the *Teague* doctrine directs a federal habeas court to give the state prisoner the benefit of the new decision, even though there is no state-court opinion applying the decision. In such a situation, a federal court must ask the *hypothetical* question "whether a state court considering [the defendant's] claim at the time his conviction became final *would have* felt compelled by existing precedent" to grant relief. *Id.* (emphasis added) (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)); *see also, e.g.*, *Jones v. Gomez*, 66 F.3d 199, 201 (9th Cir. 1995) (giving petitioner the benefit of a rule announced after the last state-court decision on the merits but before finality); *Deputy v. Taylor*, 19 F.3d 1485, 1491 n.6 (3d Cir. 1994) (same); *Motley v. Collins*, 18 F.3d 1223, 1230 (5th Cir. 1994) (same).

Not only does *Teague*'s retroactivity regime clearly delineate retroactivity principles, but it has always been separate and distinct from the question of the appropriate standard of review on federal habeas. That is, *Teague* "did not establish a standard of review [of state-court determinations of federal law]. Instead *Teague* simply requires that a state conviction on federal habeas be judged according to the law in existence when the conviction became final." *Wright*, 505 U.S. at 303-04 (O'Connor, J., concurring in the judgment); *accord id.* at 307

(Kennedy, J., concurring in the judgment) ("*Teague* did not establish a deferential standard of review of state-court decisions of federal law. It established instead a principle of retroactivity."); *id.* at 291 n.8 (plurality opinion) ("We have no difficulty with describing *Teague* as a case about retroactivity, rather than standards of review . . . .").

Indeed, this Court derived the standard of review applicable on federal habeas from a completely different statute, 28 U.S.C. § 2254, which before AEDPA provided simply that a federal court should grant habeas relief when a state judgment "violat[ed] . . . the Constitution or laws or treaties of the United States." In contrast to its construction of the retroactivity principle derived from Section 2243, this Court construed Section 2254 as *declining* to afford comity to the states, *see Wright*, 505 U.S. at 308, holding instead that federal courts should decide independently – without deferring in any way to a state court's resolution of a constitutional issue – whether the Constitution (as of the point of finality) was violated in the state proceedings. *See Miller v. Fenton*, 474 U.S. 104, 111-12 (1985); *Fay v. Noia*, 372 U.S. 391, 424 (1963); *Townsend v. Sain*, 372 U.S. 293, 318 (1963); *Brown v. Allen*, 344 U.S. 443 (1953); *see also Williams v. Taylor*, 529 U.S. 362, 400 (2000) (recounting this law). Furthermore, federal courts sometimes defined the Constitution's requirements according to mere dicta from this Court, *see., e.g., Rickman v. Bell*, 131 F.3d 1150, 1161 n.1 (6th Cir. 1997); *Branch v. Turner*, 37 F.3d 371 (8th Cir. 1994), or according to circuit precedent, *see, e.g., Freeman v. Lane*, 962 F.2d 1252, 1260 (7th Cir. 1992); *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990).

2. Congress clearly sought in AEDPA to revise the standard of review applicable on federal habeas. But there is no clear indication in the text, structure, or legislative history of AEDPA that Congress meant to alter *Teague*'s finality rule in any way.

a. *Text.* Congress left Section 2243 – from which the *Teague* retroactivity rule is derived, *see Danforth*, 552 U.S. at 278 – untouched when it enacted AEDPA. As in *Merrill Lynch*, the fact that Congress left this provision "intact" following a "comprehensive reexamination and significant amendment" of the federal habeas law suggests that Congress "affirmatively intended to preserve" *Teague*'s retroactivity rule. *Merrill Lynch*, 456 U.S. at 381-82.

Nothing about the new language Congress inserted into Section 2254 clearly indicates otherwise. New subsection (d)(1) of Section 2254 forbids a federal court from granting habeas relief based on a claim that a state court adjudicated on the merits unless the adjudication "resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." The new "contrary to, or an unreasonable application of" language affords comity to the states where it was previously lacking by replacing the pre-AEDPA de novo standard of review with one requiring deference. *See Williams*, 529 U.S. at 411-12 (O'Connor, J., for the Court). This deferential standard is "meant to be" "difficult to meet," *Harrington v. Richter*, 131 S. Ct. 770, 786 (2011), but has nothing to do with retroactivity.

Nor does the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" speak to retroactivity. Instead, it, too, relates to the degree of deference due to state-court resolutions of constitutional claims. Whereas federal courts before AEDPA sometimes granted habeas relief based on state courts' failure to abide by dicta from this Court or precedent from lower courts, *see supra* at 21, the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" makes clear that habeas relief is permissible only where state-court judgments are inconsistent with applicable *holdings* of *this Court*. *See Williams*, 529 U.S. at 412 (O'Connor, J., for the Court).

To the extent that new Section 2254(d) indicates that Congress contemplated retroactivity law at all in amending the federal habeas statute, the new provision suggests that Congress envisioned maintaining a cutoff of finality. Recall that Section 2254(d) allows a federal court to grant habeas relief if the state court's "adjudication of the claim *resulted in a decision that* was contrary to . . . clearly established Federal law" (emphasis added). This language, of course, presupposes an "adjudication" of the prisoner's claim in state court. But the statute focuses ultimately on the "result[]" of the state-court proceedings – on its "decision," rather than its adjudication or opinion – indicating that it is the outcome of a case, not the state court's treatment of this Court's case law, that a federal court should scrutinze. As this Court recently explained in *Richter*, Section 2254(d)'s inquiry does not even "require that there be an opinion from the state court

explaining the state court's reasoning." 131 S. Ct. at 784; *see also Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam) (Section 2254(d) does not require "citation" or even "awareness" of this Court's cases). Instead, the decisive question under Section 2254(d) is whether any reasonable "arguments or theories . . . could have supported[] the state court's decision." *Richter*, 131 S. Ct. at 786.

This Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), cements the reality that Section 2254(d) neither displaced nor altered *Teague*'s retroactivity rule. In *Horn*, a state prisoner sought federal habeas relief based on a decision from this Court, *Mills v. Maryland*, 486 U.S. 367 (1988), which postdated the finality of his conviction. A state court, on post-conviction review, had rejected the claim on the merits. Considering the prisoner's claim on federal habeas, the Third Circuit held that the prisoner was entitled to the benefit of *Mills*. The Third Circuit reasoned that Section 2254(d) "has changed the relevant legal principles" of retroactivity doctrine, *Horn*, 536 U.S. at 272, shifting the cutoff from finality to "the time that the state court makes the ruling on the federal constitutional issue that is being scrutinized." *Banks v. Horn*, 271 F.3d 527, 541 (3d Cir. 2001). This rule rendered state prisoners entitled to the benefit of any decision from this Court that predated a state-court opinion rejecting their claim on the merits, even if the decision postdated finality.

The Commonwealth of Pennsylvania petitioned for certiorari. In that petition, the Commonwealth objected to the Third Circuit's suggestion that "*Teague* has been replaced by § 2254(d)'s 'clearly

established' language," and argued that "the Third Circuit's new interpretation of § 2254(d), and its refusal to apply *Teague*, also specifically conflict[ed] with this Court's retroactivity jurisprudence," which was unchanged by AEDPA. Pet. for Cert. at 10-11, *available at* 2002 WL 32135087.

This Court agreed with the Commonwealth. It summarily reversed the Third Circuit, emphasizing that *Teague*'s finality cutoff remained the law, and stating that "the AEDPA and *Teague* inquiries are distinct." *Horn*, 536 U.S. at 272. In other words, when a state prisoner seeks habeas relief based on a decision that postdates finality, Section 2254(d) establishes the proper standard of review, while *Teague*'s finality cutoff continues to determine retroactivity.

The same must be true when a state prisoner seeks relief based on a decision that *pre*dates finality. Indeed, as nonsensical as it would have been to conclude that Section 2254(d) completely displaced *Teague*'s retroactivity doctrine, it would make even less sense to conclude that it silently replaced *part* of *Teague*, while leaving the rest intact.

b. *Structure.* Two aspects of the federal habeas statute's post-AEDPA structure reinforce that Congress did not intend in AEDPA to alter the retroactivity rules for federal habeas.

First, Sections 2244(b)(2) and 2254(e)(2)(A)(ii) allow habeas petitioners to file successive petitions and to introduce new evidence, respectively, if the petitioner's claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court." And in

Tyler v. Cain, 533 U.S. 656 (2001), this Court applied the *Teague* exceptions to determine whether, under Section 2244(b)(2), the new rule this Court announced in *Cage v. Louisiana*, 498 U.S. 39 (1990), applied retroactively on collateral review. That the *Teague* doctrine controls these post-AEDPA retroactivity determinations suggests – absent a strong indication to the contrary – that it controls other post-AEDPA retroactivity determinations as well.

Second, Section 2244(d)(1) requires federal habeas petitions to be filed one year from the latest of four dates:

> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

Consistent with the "standard rule" that limitations periods do not begin running until "a plaintiff has a complete and present cause of action," *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 200-01 (1997) (internal quotation marks and citation omitted), subsections (A), (C) and (D) each identify points in time when law or facts necessary to support a claim for habeas relief become definitively known. The fact that subsection (A) identifies finality, *see Jimenez v. Quarterman*, 129 S. Ct. 681, 685-85 (2009) – and not the last state-court decision on the merits – at the point where the law necessary to support a habeas claim typically becomes locked in confirms that *Teague*'s finality cutoff continues to determine the body of law applicable to such a claim.[2] Furthermore, subsection (C) reinforces the fact that retroactivity doctrine operates independently of the standard of review in Section 2254(d).

c. *Legislative history.* The congressional reports and debates surrounding AEDPA's passage

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[2] One might argue that instead of reflecting Congress' belief that the law applicable to a habeas petition does not become locked in until finality, subsection (A) just evinces Congress' desire to prevent an otherwise ripe habeas claim from proceeding until a prisoner has exhausted his opportunity for relief on direct review from this Court. But if that were so, then Congress would have provided for tolling of claims while direct-review litigation proceeded in this Court, as it did with respect to properly filed state habeas petitions. *See* 28 U.S.C. § 2244(d)(2). The fact that Congress encompassed proceedings in this Court within its affirmative limitations periods demonstrates that it believed that a habeas claim is not ripe until the point of finality.

underscore that Congress's sole objective in amending Section 2254 was to change the standard of review courts must apply when considering state prisoners' petitions for federal habeas relief.

AEDPA was the culmination of years of congressional debate regarding the federal habeas system. *See, e.g.*, H.R. 4018, 103d Cong. (1994) (as reported by H. Comm. on the Judiciary, Mar. 25, 1994) (proposing habeas reform); H.R. 3371, 102d Cong. (1991) (as reported by H. Comm. on the Judiciary, Oct. 7, 1991) (same); H.R. 5269, 101st Cong. (1990) (as reported by H. Comm. on the Judiciary, Sept. 5, 1990) (same). Though certain aspects of the *Teague* decision had been the subject of considerable analysis in those years, *see, e.g.*, H.R. REP. NO. 103-470, at 4 (1994) (criticizing the Court's definition of a new rule under *Teague* as "far too broad"); H.R. REP. NO. 102-242, at 131 (1991) (criticizing the *Teague* exceptions), no one had ever criticized the ability under existing habeas law of prisoners to receive the benefit of decisions from this Court announced after their last state-court decision on the merits but before finality. In fact, neither AEDPA's conference report, nor the 1996 House and Senate debates mention *Teague* at all. *See* H.R. REP. NO. 104-518 (1996) (Conf. Rep.); 142 CONG. REC. H3599 (Apr. 18, 1996), S3427 (Apr. 17, 1996), H2247 (Mar. 14, 1996), H2129 (Mar. 13, 1996).

Instead, all of the discussion and debate surrounding Section 2254 involved the standard of review applicable on federal habeas. *See* H.R. REP. No. 104-518, at 111 (explaining that AEDPA's amendments require federal courts to accord "deference" to state court determinations); 142 CONG.

REC. H3602-04 (Apr. 18, 1996) (statement of Sen. Kennedy) (criticizing Section 2254's requirement of deference to state court decisions); *id.* (statement of Rep. Hyde) (supporting "the deference that a Federal judge must give in a habeas proceeding to a State court decision"); 142 CONG. REC. S3439-42 (Apr. 17, 1996) (statement of Sen. Moynihan) (criticizing Section 2254's requirement of deference to state court decisions); 142 CONG. REC. H2247-49 (Mar. 14, 1996) (statement of Rep. Hyde) (explaining AEDPA's revision of the habeas statute as requiring "deference" to state court decisions).

As this Court noted in another case involving a claim that a statutory amendment altered important and well-settled law, "if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point" in the legislative history. *Chisom*, 501 U.S. at 396; *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999) ("[I]t tests the limits of reason to suggest that despite such silence, Members of Congress . . . intended to enact" a "significant change."). The fact that no Member of Congress so much as mentioned retroactivity law reinforces that AEDPA was not meant to alter that law.

d. *Empirical evidence.* The states' own post-AEDPA behavior confirms that there is no clear indication that AEDPA altered *Teague*'s finality cutoff. If AEDPA had been clear in creating a different, stricter cutoff for "clearly established Federal law," one would have expected the states to have raised the issue immediately after AEDPA's passage, just as the states immediately argued that

AEDPA had changed the standard of review on habeas. For over a decade, in case after case, they did not.[3] The retroactivity question became the subject of significant dispute only when the First Circuit raised and decided it *sua sponte* in *Foxworth v. St. Amand*, 570 F.3d 414, 432 (1st Cir. 2009), and this Court expressed "some uncertainty" on the subject in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010). The states' decade-plus of silence on this question belies any present assertion that AEDPA clearly or specifically altered the retroactivity cutoff for the application of this Court's decisions.

3. Despite the absence of any clear indication that Congress intended to partially abrogate *Teague* in Section 2254(d), the Third Circuit gave two reasons for holding that Section 2254(d) precludes a state prisoner from obtaining federal habeas relief based on a decision from this Court that predates finality but postdates the last reasoned state-court

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[3] *See Thompson v. Runnel*, 621 F.3d 1007, 1016 n.7 (9th Cir. 2010) (state conceded that prisoner was entitled to benefit from decision that predated finality but postdated last reasoned state-court decision; habeas relief granted); *Lyons v. Weisner*, 247 Fed. App'x 440, 444 (4th Cir. 2007) (same); *Rogers v. Hauck*, 2009 WL 3584923, at *13 n.4 (D.N.J. Oct. 26, 2009) (habeas petition implicated issue, but state apparently did not contest that finality was the cutoff); *Daly v. Burt*, 613 F. Supp. 2d 916, 924, 938-39 (E.D. Mich. 2009) (same); *Khan v. Fischer*, 583 F. Supp. 2d 390, 392 n.1 (E.D.N.Y. 2008) (same); *Belton v. Blaisdell*, 559 F. Supp. 2d 128, 148 n.22 (D.N.H. 2008) (same); *Cvijetinovic v. Eberlin*, 617 F. Supp. 2d 620, 635 (N.D. Ohio 2008) (same), *rev'd on other grounds*, 617 F.3d 833 (6th Cir. 2010); *Gerrard v. Parrish*, 2007 WL 151729, at *10 (D.N.J. Jan. 17, 2007) (same).

decision. First, while the Third Circuit acknowledged that this Court expressly reserved this issue two years ago in *Spisak*, it believed that, "[a]s an inferior federal court, [it was] not free to ignore" several previous opinions from this Court repeating Justice O'Connor's statement in *Williams*, 529 U.S. at 412, that "clearly established Federal law" "refers to the holdings as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*." Pet. App. 18a, 25a-27a (emphasis added by Third Circuit). Second, the Third Circuit asserted that a federal court cannot sensibly apply Section 2254(d)'s rule of deference to a constitutional claim based on "a Supreme Court decision that did not exist" at the time of the relevant state-court decision. *Id.* Neither of these rationales withstands scrutiny.

a. Justice O'Connor's passing reference in *Williams* to "the time of the relevant state-court decision" does not indicate, much less hold, that Section 2254(d) altered *Teague*'s retroactivity framework. Nor do any of this Court's subsequent citations to Justice O'Connor's phraseology supplant *Teague*'s finality cutoff.

The sentence in which Justice O'Connor referred to the "the time of the relevant state-court decision" was not at all about retroactivity. Rather, the point of the sentence was to emphasize that the statutory phrase "clearly established Federal law, as determined by the Supreme Court of the United States" "refers to the holdings, as opposed to the dicta, of this Court's decisions." 529 U.S. at 412; *see also Carey v. Musladin*, 549 U.S. 70, 79 (2006) (Stevens, J., concurring in the judgment) (explaining that the import of this sentence was its "dictum about

dicta"). The sentence's concluding phrase "as of the time of the relevant state-court decision" merely referenced the general notion that "new rules" do not apply on habeas. As with sentences in *Teague* itself and in numerous other opinions excerpted in the margin, the temporal reference was imprecise but in no way signaled a change in retroactivity law.[4]

Justice O'Connor confirmed as much in the same paragraph of her portion of the *Williams* opinion. Explicitly addressing the interaction between AEDPA and *Teague*, she explained that:

> With one caveat, whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under § 2254(d)(1). . . . The one caveat, as the statutory language makes clear, is that § 2254(d)(1) restricts the source

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[4] *See, e.g.*, *Teague*, 489 U.S. at 310 (key is whether state prisoners "*trials and appeals* conformed to *then-existing* constitutional standards") (emphasis added); *Gray v. Netherland*, 518 U.S. 152, 166 (1996) (*Teague* requires "applying constitutional standards *contemporaneous with the habeas petitioner's conviction*") (emphasis added); *Lockhart v. Fretwell*, 506 U.S. 364, 387 (1993) (Stevens, J., dissenting) ("In *Teague v. Lane*, the Court . . . h[eld] that the claims of federal habeas petitioners will, in all but exceptional cases, be judged under the standards prevailing *at the time of trial*.") (emphasis added); *Saffle*, 494 U.S. at 488 (*Teague* requires that "state courts conduct criminal proceedings in accordance with the Constitution as interpreted *at the time of the proceedings*") (emphasis added).

> of clearly established law to this Court's jurisprudence.

529 U.S. at 412. Lest there be any doubt that Justice O'Connor expected *Teague*'s finality cutoff to continue in force, she also joined the portion of the majority opinion authored by Justice Stevens, in which this Court explained that "[t]he threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established *at the time his state-court conviction became final*." *Id.* at 390 (emphasis added).

At any rate, the question of retroactivity was not before the Court in *Williams*, because the petitioner in that case sought to rely on a decision – *Strickland v. Washington*, 466 U.S. 668 (1984) – that was announced long before his state-court proceedings even began. *See Williams*, 529 U.S. at 390. Nor was the timing question before this Court in any of the four other cases the Third Circuit cited, in which this Court cited Justice O'Connor's "relevant state-court decision" language. *See Carey*, 549 U.S. at 74; *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Wiggins v. Smith*, 539 U.S. 510, 520 (2003); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).[5] Given that

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[5] After the Third Circuit issued its opinion, this Court likewise stated in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011) that "State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" 131 S. Ct. at 1399 (quoting *Lockyer*, 538 U.S. at 71-72). But just as in *Lockyer* and the other cases cited above, the issue of the retroactivity of this Court's decisions was not before the Court in that case. *See id.*

the difference between *Teague*'s finality rule and a rule setting the retroactivity cutoff at the "relevant state-court decision" would have no immediately apparent consequence in a case focused on a different question, this Court's repetitions of Justice O'Connor's "relevant state-court decision" language from *Williams* in cases that did not raise the issue should hardly restrict this Court here. *Cf. Lingle v. Chevron U.S.A.*, 544 U.S. 528, 531, 542 (2005) ("On occasion, [an incorrect] doctrinal rule or test finds its way into our case law" by way of "regrettably imprecise" language in an opinion dealing with a different issue.).

b. The Third Circuit's conclusion that Section 2254(d) would not work properly if finality remains the rule is likewise erroneous. Under *Teague*, when this Court announces a decision between the last state-court decision on the merits and finality, federal courts must assess the state-court judgment in light of what the state court "would have" said had it applied the intervening decision. *Caspari*, 510 U.S. at 390. That directive works just as well under a deferential standard of review as it does in a de novo regime. Indeed, this Court has already held that Section 2254(d)'s rule of deference applies to all state-court decisions rejecting federal claims on the merits, regardless of whether the state courts applied or even were aware of existing decisions from this Court. *See Richter*, 131 S. Ct. at 784 (Section 2254(d) applies to federal habeas review of state-court summary orders); *Packer*, 537 U.S. at 8 (per curiam) ("Application of Section 2254(d) does not require citation of our cases – indeed, it does not even require *awareness* of our cases, so long as neither the

reasoning nor the result of the state-court decision contradicts them."). As this Court explained, where a state court opinion makes no mention of one or more of this Court's cases, a federal habeas court "must determine what arguments or theories" based on those case(s) "*could have* supported[] the state court's decision," and then apply AEDPA's deferential standard to that hypothetical opinion. *Richter*, 131 S. Ct. at 786 (emphasis added). Precisely the same method of analysis applies in this case.

Indeed, this Court performed just this exercise, without any apparent difficulty, in *Spisak*. There, this Court assessed whether the Ohio Supreme Court's adjudication of a prisoner's Eighth Amendment claim resulted in a decision that was contrary to, or an unreasonable application of, this Court's decision in *Mills*, even though *Mills* had been issued after the state court's decision. *See Spisak*, 130 S. Ct. at 684. Numerous lower courts have conducted the same analysis with respect to other intervening decisions from this Court.[6]

To be sure, the "backward-looking" nature of Section 2254(d) means that federal habeas review is "limited to *the record* that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011) (emphasis added). The factual record must be fixed at the time

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[6] *See, e.g.*, *Thompson*, 621 F.3d at 1016 n.7; *Lyons*, 247 Fed. App'x at 444; *Rogers*, 2009 WL 3584923, at *13 n.4; *Daly*, 613 F. Supp. 2d at 924, 938-39; *Khan*, 583 F. Supp. 2d at 392 n.1; *Belton*, 559 F. Supp. 2d at 148 n.22; *Cvijetinovic*, 617 F. Supp. 2d at 635; *Gerrard*, 2007 WL 151729, at *10.

of the state-court adjudication whose result is under review in order to ensure that defendants submit evidence (and make arguments based on such evidence) in a timely manner. Under any system of appellate review, parties may not introduce new evidence that postdates the decision under review. *See, e.g.*, *C.N. v. Willmar Pub. Schs.*, 591 F.3d 624, 629 n.4 (8th Cir. 2010); *Adams v. Holland*, 330 F.3d 398, 406 (6th Cir. 2003). *Pinholster* simply extends this principle to federal habeas review of state-court judgments.

But the universe of applicable law is not similarly limited. This Court made clear in *Griffith* that parties on appeal may rely on newly decided cases in support of previously raised claims. 479 U.S. at 328; *see also Powell v. Nevada*, 511 U.S. 79, 84 (1994). And this Court likewise recognized long ago in *Teague* that it makes sense to apply this principle to federal habeas review. *See* 489 U.S. at 304.

B. Setting The Cutoff At The Date Of The Last State-Court Decision On The Merits Would Create Numerous Practical And Constitutional Problems.

The Third Circuit's new pre-finality cutoff would be problematic for at least two reasons. First, it would result in the "selective application of new rules" announced on direct review, in contravention of *Griffith*'s "principle of treating similarly situated defendants the same." 479 U.S. at 323. Second, the Third Circuit's pre-finality cutoff would place increased constitutional pressure on this Court's grant, vacate, and remand (GVR) practice.

1. The Third Circuit majority's interpretation of Section 2254(d) would "subvert *Griffith*," *Foxworth v. St. Amand*, 570 F.3d 414, 432 (1st Cir. 2009), by creating a "twilight zone" in which state courts are able – intentionally or unintentionally – to strip defendants of their ability to seek federal habeas relief based decisions from this Court that predate finality of their convictions. Pet. App. 62a (Ambro, J., dissenting). In *Griffith*, this Court held that "basic norms of constitutional adjudication" require courts to apply "a new rule for the conduct of criminal prosecutions . . . retroactively to all cases, state or federal, pending on direct review or not yet final." 479 U.S. at 323, 328. Fixing the cutoff for "clearly established Federal law" at the last reasoned state-court decision would violate this principle by producing arbitrary results among state prisoners seeking vindication of their constitutional claims.

For one thing, a defendant's ability to seek federal habeas review based on a decision from this Court that postdates a state intermediate appellate court's ruling would depend on whether the state high court grants discretionary review. And a state supreme court's decision whether to grant discretionary review (as in this Court) is subject to many factors unrelated to the question whether the law entitles defendant to relief. *See, e.g.*, *Ross v. Moffitt*, 417 U.S. 600, 613-14 (1974). Indeed, a state high court may well deny discretionary review precisely *because* an intervening decision from this Court has just clarified uncertainty in the law that existed at the time of the state intermediate court's decision – obviating the need for a state high court opinion. *See O'Sullivan v. Boerckel*, 526 U.S. 838,

846 (1999) (noting that a state supreme court may choose to expend its resources only on "questions of broad significance" and not on error correction).[7] Under such circumstances, a state high court may be content to leave the defendant, if he wishes, to pursue federal habeas relief. *Cf. Spencer v. Georgia*, 500 U.S. 960 (1991) (Kennedy, J., concurring in the denial of certiorari) (explaining that denial of review is appropriate when "habeas review presents an appropriate and adequate forum for . . . resolving petitioner's contentions").

Under the Third Circuit's regime, however, this sensible method of managing a state high court's workload would no longer be equitable. Once the state high court denied review, the defendant would be precluded from seeking federal habeas relief based on the intervening decision, even though he completed his state-court proceedings *after* the person whose case this Court used to establish the new rule and would have been entitled to benefit from that new rule had the state court granted discretionary review.

Even if a state supreme court presented with an intervening decision from this Court did grant review, the Third Circuit's rule would still allow the state court to deprive the defendant of his ability to seek federal habeas relief by dismissing the case as

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[7] This Court follows a similar rationale when it denies or dismisses certiorari in a case because an intervening statutory change has effectively resolved a conflict of authority. *See* Eugene Gressman et al., Supreme Court Practice 247 (9th ed. 2007) (collecting examples).

improvidently granted. It is not farfetched to think that some resource-strapped state courts – after reviewing briefs on the merits and even hearing oral argument – might decide as a means of docket management to dismiss, rather than reject with written decisions, some prisoners' appeals in which they are not inclined to upset decisions below. *See Richter*, 131 S. Ct. at 784 (recognizing that a state court has an incentive "to concentrate its resources on the cases where opinions are most needed"). Under *Teague*, there is no difference – even in a "twilight zone" scenario – between these two ways of resolving a case; either way, the prisoner can later seek federal habeas relief based on the intervening decision. Yet under the Third Circuit's rule, the choice between the two different ways of disposing of cases would – just like the faulty system of retroactivity that *Teague* replaced – "le[a]d to unfortunate disparity in the treatment of similarly situated defendants on collateral review." *Teague*, 489 U.S. at 305.

Contrary to the Third Circuit's suggestion, Pet. App. 37a, the availability of state collateral review cannot solve these problems. States have no obligation to provide any system of collateral review. *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991); *Pennsylvania v. Finley*, 481 U.S. 551, 556-57 (1987). Many of the states that have such systems preclude prisoners from pressing claims that they have previously litigated. And states may enforce these bars on relitigation even when intervening decisions would bolster those claims. *See, e.g.*, Pet. App. 34a n.12 & 63a n.13 (Ambro, J., dissenting) (debating whether Pennsylvania law would bar such claims);

Ala. R. Crim. P. 32.2(a)(2) (providing without exception that state habeas petitioner "will not be given relief under this rule based on any ground which was raised or addressed at trial") *Thomas v. State*, 298 S.W.3d 610, 615 (Tenn. Crim. App. 2009) (suggesting that bar on previously litigated claims applies even when an intervening decision from this Court created a "change in the method of analysis on the issue"). Thus, federal habeas review is the only guaranteed form of collateral review available to apply this Court's decisions issued in the pre-finality "twilight zone."

2. The Third Circuit's rule would also raise serious administrative and constitutional issues concerning state prisoners' ability to seek orders GVR'ing state-court decisions in light of intervening case law.

As an initial matter, the Third Circuit's rule precluding state prisoners from obtaining federal habeas relief based on intervening decisions would make this Court's GVR practice – something that has always been considered "discretionary," *Lawrence v. Chater*, 516 U.S. 163, 166 (1996) – mandatory in situations involving "twilight zone" claims. *Griffith* holds that when a defendant seeks certiorari in this Court based on an intervening decision, the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. Yet this Court need not grant plenary review in every case; this Court "fulfill[s] [its] judicial responsibility by instructing the lower courts" in a GVR "to apply the new rule retroactively to cases not yet final." *Id.* at 323; *accord Lawrence*, 516 U.S. at

167. While these passages might themselves have been read to constitutionally require this Court's GVR practice, this Court continued to deem the practice "flexib[le]," *Lawrence*, 516 U.S. at 168, while state prisoners have been able to pursue federal habeas relief based on any pre-finality decision. Yet the Third Circuit's pre-finality cutoff would deprive state prisoners of that right, leaving them with only one avenue to litigate constitutional claims dependent on intervening decisions: a petition for certiorari to this Court on direct review. Accordingly, this Court would be required to assess the merits of every such petition and to either grant plenary review or at least GVR all meritorious claims.

It would follow, under rudimentary notions of fairness (and seemingly, as well, under this Court's right-to-counsel jurisprudence), that the Third Circuit's pre-finality cutoff would require providing such state prisoners with counsel to seek certiorari. Many states, including Pennsylvania, currently do not appoint counsel for purposes of seeking certiorari in this Court. *See* 24 Pa. Code § 122(B)(2), Comment (2000) (indigent defense appointments run only "through the Supreme Court of Pennsylvania"). This Court, of course, does not appoint such counsel either. But criminal defendants are entitled to counsel to pursue appellate review when two circumstances are present: (1) the appellate court's disposition is one that necessarily turns on "the merits of claims" raised in the petition; and (2) the affected defendant-appellants "are generally ill equipped to represent themselves." *Halbert v. Michigan*, 545 U.S. 605, 617 (2005); *see also Douglas v. California*, 372 U.S. 353 (1963). Both conditions

would be present as a consequence of the Third Circuit's pre-finality cutoff.

First, as just explained, in reviewing a state prisoner's petition for certiorari based on an intervening decision, this Court would be required to "look[] to the merits of the claim[]" and to engage in "error-correction," at least to the extent of vacating and remanding incorrect decisions. *Halbert*, 545 U.S. at 617-19. It makes no difference that certiorari review is "formally categorized" as discretionary. *Id.* at 619; *see* 28 U.S.C. § 1257(a). All that matters is whether certiorari review would "provide[] the first, and likely the only, direct review the defendant's conviction and sentence [would] receive" under the governing law. *Halbert*, 545 U.S. at 619. Such would be the case in "twilight zone" scenarios as a result of the Third Circuit's rule.

Second, as this Court has emphasized, a criminal defendant is generally ill-equipped to represent himself when making arguments that a lawyer has not previously made on his behalf. *Halbert*, 545 U.S. at 620-21; *compare Ross*, 417 U.S. at 614-15 (no right to counsel where defendant's "claims had once been presented by a lawyer and passed upon by an appellate court"). This is particularly true with respect to invoking this Court's certiorari jurisdiction and GVR practice. The GVR process is an arcane pocket of appellate procedure; in fact, this Court's own *Guide for Prospective Indigent Petitioners for Writs of Certiorari* does not even mention it. To say the least, navigating this process "is a perilous

endeavor for a layperson," *Halbert*, 545 U.S. at 621, particularly when one's liberty is at stake.[8]

* * *

As in *INS v. St. Cyr*, 533 U.S. 289, 305 (2001), "[t]he necessity of resolving such [] serious and difficult constitutional issue[s] – and the desirability of avoiding that necessity – simply reinforce the reasons for requiring a clear and unambiguous statement of congressional intent" before holding that Congress has altered habeas law. The carefully crafted *Teague/Griffith* regime has sensibly and effectively governed the complex realm of retroactivity law for over twenty years. Given that there is no clear indication that Congress sought to tinker with it in AEDPA, this Court should refrain

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[8] Of course, insofar as, under the Third Circuit's rule, the right to counsel would apply to the certiorari stage, the failure of a court-appointed lawyer to raise a claim that would have entitled the defendant to a GVR and a victory on remand would typically constitute ineffective assistance of counsel. *See, e.g.*, *Kimmelman v. Morrison*, 477 U.S. 365, 374, 382 (1986) (the failure, without any reasonable strategic basis, to raise a readily available and winning argument constitutes ineffective assistance of counsel). This, in turn, would require this Court to develop a remedial jurisprudence that would allow state prisoners, such as petitioner, who were denied effective assistance of counsel (or any counsel at all) to have their right to seek certiorari on direct review (for purposes of obtaining a GVR, and an adjudication on the merits in state court) reinstated. *See Roe v. Flores-Ortega*, 528 U.S. 470 (2000) (state prisoners are entitled on federal habeas review to reinstatement of right to appeal if they lacked counsel at that stage and were prejudiced thereby); *Rodriquez v. United States*, 395 U.S. 327, 329 (1969) (same with respect to federal prisoners).

from doing so and unleashing a potential cascade of difficulties.

II. At The Very Least, A Federal Habeas Petitioner Should Be Entitled To Rely On A Decision From This Court That Was Announced Before A State Supreme Court Disposed Of His Cases On Direct Review.

Even if Section 2254(d)'s phrase "clearly established Federal law" does somehow contain a new retroactivity rule (with respect to prefinality decisions from this Court, but not, under *Horn*, to postfinality decisions) that is keyed to when the state courts last decided defendant's claim, that rule should be satisfied here. Specifically, so long as a decision from this Court on which the prisoner seeks to rely was announced before the state high court considered and disposed of his case on direct review – and especially if that disposal came after reviewing full briefing on the merits – the prisoner should be able to seek habeas relief based on the new decision. No more stringent retroactivity rule could plausibly be necessary to satisfy the comity principles underlying federal habeas review of state judgments. And such a rule is linguistically compatible with the text of AEDPA.

A. The Comity Interests Underlying Federal Habeas Review Of State Convictions Require Only That State Courts Have A Fair Opportunity On Direct Review To Apply This Court's Decisions.

This Court has long recognized that federal habeas law concerning the review of a state-court

judgment should "promote[] comity" but "not unreasonably impair the prisoner's right to relief." *Rose v. Lundy*, 455 U.S. 509, 522 (1982). That being so, the premise underlying retroactivity law on federal habeas is that state-court judgments need not comport with constitutional rules announced after the state-court litigation "concluded," but must be "consistent with . . . constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (quotation marks and citation omitted); *see also Wright*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment) (state-court judgments should not be "undermined by [this Court's] changing a rule [that was] thought correct" at the time the case was in the state courts); *Teague*, 489 U.S. at 306. In other words, state courts should generally have a fair opportunity to decide prisoners' claims. But when they had such an opportunity, comity is not offended by a federal court's reviewing the state courts' resolution of the claim.

This principle that "state courts should have the first opportunity to review [state prisoners'] claim[s] and provide any necessary relief" also underlies the exhaustion doctrine, which dictates that federal habeas courts may not review state convictions unless and until state prisoners have exhausted all available state remedies, including the possibility of seeking discretionary review. *Boerckel*, 526 U.S. at 844; *see also Ex parte Hawk*, 321 U.S. 114, 117 (1944). But, as with retroactivity law, comity in the exhaustion context goes only so far. This Court has held that comity "requires only that state prisoners give state courts a *fair* opportunity to act on their claims," and nothing more. *Boerckel*, 526 U.S. at

844. Hence, the exhaustion requirement is satisfied even when "a state appellate court chooses to ignore in its opinion a federal constitutional claim squarely raised in petitioner's brief in the state court." *Dye v. Hofbauer*, 546 U.S. 1, 3 (2005) (per curiam).

Insofar as Congress modified prior habeas law when it enacted AEDPA, it did so consistent with the "goal of promoting comity, finality, and federalism by giving state courts the first opportunity to review [state prisoners] claim[s]." *Jimenez*, 129 S. Ct. at 686 (quotation marks omitted). As is specifically relevant here, AEDPA – like this Court's pre-AEDPA jurisprudence – reflects "Congress's intent to channel prisoners' claims first to the state courts." *Pinholster*, 131 S. Ct. at 1398-99. Accordingly, if Congress had sought to alter retroactivity law in new Section 2254(d), there is no reason to believe that Congress would have intended to do anything more than replace the previous finality cutoff with a new one that strictly respects this "fair opportunity" principle.

A rule that defines "clearly established Federal law" as including any holding from this Court announced before a state high court disposed of the case is all that is plausibly necessary to satisfy the fair opportunity principle. State courts have a fair opportunity to apply a decision from this Court when two things are true: (1) the decision (per retroactivity doctrine) is announced before a state supreme court disposes of a petition for review; and (2) the defendant (per the exhaustion doctrine) fairly presents to the state supreme court the claim to which the decision is relevant.

To be sure, state supreme courts are under no obligation to hear constitutional claims presented in petitions for discretionary review. But an *obligation* to decide a claim is different than a *fair opportunity* to decide it. And a state supreme court presented with a properly preserved constitutional claim and new authority from this Court that supports it unquestionably has a fair opportunity to decide that claim, especially when (as here) it grants review and reviews full merits briefing before disposing of the case. In contrast to subsequent proceedings that may be available under state law, such as petitions for rehearing or petitions for mandamus, discretionary review in a state supreme court on direct appeal is "a normal, simple, and established part of [a] State's appellate review process" in which state courts regularly cure constitutional errors. *Boerckel*, 526 U.S. at 844-45.

Here, the Pennsylvania Supreme Court granted review expressly to review petitioner's Confrontation Clause claim. J.A. 156. Upon receiving that order, petitioner submitted a merits brief explaining that the "redaction of the confessions of two nontestifying codefendants cannot stand constitutional muster," and that "*Gray v. Maryland*" – the intervening case upon which is habeas petition is now based – "prohibits what transpired herein and absolutely mandates a new trial." J.A. 171. Conditioning petitioner's ability to rely on *Gray* in federal habeas upon whether the Pennsylvania Supreme Court elected to exercise its fair opportunity to decide this claim would "unreasonably impair the [petitioner's] right to relief," without doing anything necessary to advance comity interests. *Rose*, 455 U.S. at 522.

B. This Rule Is Compatible With The Text Of Section 2254(d).

Section 2254(d) provides that a state prisoner may not obtain habeas relief "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." On its face, Section 2254(d) requires two things. First, it requires a state court to have "adjudicated" the claim on the merits. Second, it requires a state-court "decision" to be contrary to, or an unreasonable application of, clearly established federal law.

The Third Circuit assumed that Section 2254(d) requires these two rulings to be one and the same (such that a decision of this Court must predate the state court's adjudication on the merits in order to constitute clearly established law for purposes of federal habeas review). Pet. App. 24a. But that is not so. When a state intermediate court rejects a claim on the merits and then the state high court, as here, denies discretionary review notwithstanding an intervening decision from this Court that plainly shows that the intermediate court's decision is erroneous, both textual requirements of Section 2254(d) are satisfied. The intermediate court decision is an "adjudication" on the merits, and the denial of discretionary review (especially after reviewing full briefing on the merits) is a "decision" whose substantive result is contrary to federal law – insofar as if the state supreme court had addressed the merits, it would have been compelled, under

Griffith, to apply the intervening decision and to grant relief, *see Powell*, 511 U.S. at 84.

Nor is there any good reason to equate Section 2254(d)'s requirement of an "adjudication" with its requirement that the state court's "decision" be contrary to clearly established law. The purpose of the former phrase is to contrast claims that the state court system resolved on the merits from those that it either resolved on procedural grounds, or ignored or did not reach. *See, e.g.*, *Wainwright v. Sykes*, 433 U.S. 72, 85 (1977) (contrasting claims rejected on procedural grounds from those resolved on the merits); *Pinholster*, 131 S. Ct. at 1410-11 (contrasting issues resolved on the merits from those that state courts "did not reach"). The purpose of the latter phrase ("a decision") is entirely different: to direct the federal habeas court to measure the outcome of the state-court proceedings against the relevant body of federal law. Only the latter purpose even arguably brings retroactivity law into play.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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APPENDIX

STATUTORY APPENDIX

Chapter 153 of Title 28 of the United States Code, 28 U.S.C. §§ 2241-2255, *as amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), provides in relevant part:*

§ 2243. ISSUANCE OF WRIT; RETURN; HEARING; DECISION.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

The writ, or order to show cause shall be directed to the person having custody of the person detained. It shall be returned within three days unless for good cause additional time, not exceeding twenty days, is allowed.

The person to whom the writ or order is directed shall make a return certifying the true cause of the detention.

When the writ or order is returned a day shall be set for hearing, not more than five days after the return unless for good cause additional time is allowed.

Unless the application for the writ and the return present only issues of law the person to whom the writ is directed shall be required to produce at the hearing the body of the person detained.

The applicant or the person detained may, under oath, deny any of the facts set forth in the return or allege any other material facts.

The return and all suggestions made against it may be amended, by leave of court, before or after being filed.

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

§ 2244. FINALITY OF DETERMINATION.

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B) (i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed,

if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2254. STATE CUSTODY; REMEDIES IN FEDERAL COURTS.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that –

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in

custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) the claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an

appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

RESPONDENT'S BRIEF

RECORD
AND
BRIEFS

No. 10-637

Supreme Court, U.S.
FILED
MAR 4 - 2011
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

ERIC GREENE,
Petitioner

v.

JON FISHER, SUPERINTENDENT, SCI-SMITHFIELD;
THE DISTRICT ATTORNEY OF PHILADELPHIA
COUNTY; THE ATTORNEY GENERAL OF THE
STATE OF PENNSYLVANIA,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF IN RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May a federal habeas court overturn a state criminal judgment on the ground that the state court did not foresee and follow a future ruling of this Court – decided *after* the state court ruling but before the point of technical "finality" – in light of AEDPA's clear mandate requiring deference to state court determinations that reasonably apply existing United States Supreme Court precedent?

TABLE OF CONTENTS

PAGE

Question Presented i

Table of Authorities iv

Counterstatement of the Case 1

Factors Bearing on the Request for Review

The question presented arises infrequently and the decision below was clearly correct, but there is a two-circuit conflict and "uncertain" precedent, and the issue implicates the fundamental nature of deferential habeas review. Respondents do not oppose the grant of the petition. 5

A. The question presented arises infrequently. 6

B. The decision below was clearly correct. 9

PAGE

C. The number of conflicting circuit court cases is small, but the conflict is real. 13

D. This case is a suitable vehicle for resolution of this issue. 17

Conclusion 19

TABLE OF AUTHORITIES

PAGE

Federal Cases

Abdul-Kabir v. Quarterman, 550 U.S. 233 (2007) 11

Bell v. Cone, 543 U.S. 447 (2005) 11

Besser v. Walsh, 601 F.3d 163 (2nd Cir. 2010) 14

Brown v. Payton, 544 U.S. 133 (2005) 11

Brunson v. Higgins, 708 F.2d 1353 (8th Cir. 1983) 10

Bruton v. United States, 391 U.S. 123 (1968) 3

Crawford v. Head, 311 F.3d 1288 (11th Cir. 2002) 14

Foxworth v. St. Amand, 570 F.3d 414 (1st Cir. 2009) 7, 13

Gray v. Maryland, 523 U.S. 185 (1998) . . . *passim*

Greene v. Palakovich, 606 F.3d 85 (3rd Cir. 2010) 5, 15

PAGE

Harris v. Kuhlmann, 346 F.3d 330 (3rd Cir. 2003) 14

Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000) 14

Honeycutt v. Mahoney, 698 F.2d 213 (4th Cir. 1983) 10

Horn v. Banks, 536 U.S. 266 (2002) 9

Jiminez v. Walker, 458 F.3d 130 (2nd Cir. 2006) 14

Lockyer v. Andrade, 538 U.S. 63 (2003) 11

Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) 8, 13, 14

Mills v. Maryland, 486 U.S. 367 (1988) 8, 14

Morse v. Texas, 691 F.2d 770 (5th Cir 1982) 10

Newland v. Hall, 527 F.3d 1162 (11th Cir. 2008) 14

Portalin v. Graham, 624 F.3d 69 (2nd Cir. 2010) 8, 14

PAGE

Schriro v. Landrigan, 550 U.S. 465 (2007) 11

Schwab v. Crosby, 451 F.3d 1308 (11th Cir. 2006) 14

Sistrunk v. Vaughn, 96 F.3d 666 (3rd Cir. 1996) 10

Smith v. Spisak, 130 S. Ct. 676 (2010) . . . . *passim*

Smith v. Spisak, 2009 U.S. Trans. LEXIS 50 (U.S. Trans. 2009) 17

Teague v. Lane, 489 U.S. 288 (1989) 6, 9

Thompson v. Runnel, 621 F.3d 1007 (9th Cir. 2010) 8, 13, 15

Wenger v. Frank, 266 F.3d 218 (3rd Cir. 2001) 7

Wiggins v. Smith, 539 U.S. 510 (2003) 11

Williams v. Taylor, 529 U.S. 420 (2000) . . 9, 10, 11

Yarborough v. Alvarado, 541 U.S. 652 (2004) 11

PAGE

Federal Statutes

28 U.S.C. § 2254(d) 13, 18

28 U.S.C. § 2254(d)(1) 9, 11

Docketed Cases

Stovall v. Miller, No. 10-851 (U.S. Supreme Court) 13

State Cases

Foxworth v. St. Amand, 929 N.E.2d 286 (Mass. 2010) 7, 8

State Rules

Pa. R. App. P. 1113(a) 7

Pa. R. App. P. 2542(a) 7

COUNTERSTATEMENT OF THE CASE

Eric Greene is a Pennsylvania state prisoner who was convicted of second-degree murder, three counts of robbery, and conspiracy. In early December of 1993, he and four other individuals robbed Lily's Market, killing the owner of the store – Francisco Azcona – in front of his wife and sister-in-law.

Greene was one of five co-conspirators tried jointly. Two of the five gave statements to police confessing their involvement. Pre-trial, Greene filed a motion for severance arguing the statements of his two co-defendants were "not suitable for redaction" and "[a]ny attempt at such would serve only to prejudice the defendant." The statements were ultimately redacted using mostly neutral phrases like "the other guy," but at points the names were removed and replaced by only a blank.

During the pre-trial severance hearing, Greene ultimately consented to the redaction proposed by the trial court, calling the court's method "brilliant." He did, however, maintain his position that use of the statements during trial would violate his rights under the Confrontation Clause – not because of the redaction method, but because the statements incriminated him inferentially. That is, he argued that, when the statements were considered in the context of the evidence as a whole, the jury might be able to infer that he was involved.

That argument was unsuccessful because the statements (as redacted) did not in fact match up with the evidence presented at trial. For example, the trial testimony indicated that five individuals were responsible for the robbery. One of the redacted statements, however, indicated there were six men involved in the crime. The second statement (after it was redacted) seemed to indicate that only four men were involved in the crime. Furthermore, both statements asserted that three men went into the store for the robbery, but the testimony at trial indicated that four men went into the store. The absence of a one-to-one correspondence thus made it impossible to "fill in the blanks" in the redaction.

After conviction, Greene appealed to the Pennsylvania Superior Court. The Superior Court is an intermediate appellate court, but, because the Pennsylvania Supreme Court exercises only discretionary review in non-capital criminal cases, the Superior Court is the final court of review for almost all Pennsylvania criminal judgments.

On December 16, 1997, four months *before* this Court's decision in *Gray v. Maryland*, 523 U.S. 185 (1998), the Superior Court rejected Greene's Confrontation Clause claim.[1] *Gray* was issued

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[1]As in the trial court, Greene's brief on appeal did not (continued...)

while Greene's petition for allowance of appeal to the state supreme court was pending. The *Gray* decision held that the use of blanks in redacted statements can raise a *Bruton*[2] problem, even aside from the issue of contextual implication.

Greene did not attempt to supplement his petition in light of the new precedent from this Court. Nonetheless, the Pennsylvania Supreme Court granted the petition for allowance of appeal, limited to the Confrontation Clause issue. However, after both parties filed briefs, on April 30, 1999, the court summarily dismissed Greene's appeal, noting that permission to file the appeal was "improvidently granted."

Greene filed two collateral petitions in state court, which were both denied; he appealed only one of these decisions. He did not ask the state court to apply *Gray* to his case in connection with any of this collateral litigation.

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[1](...continued)
challenge the method used for the redaction, either in relation to the use of "other guy" or as to the use of blanks. The appellate court nonetheless considered both the contextual implication issue actually raised, as well as the trial court's use of neutral terms such as "the other guy." The court did not, however, address the (uncontested) use of blanks in the redacted statements.

[2]*Bruton v. United States*, 391 U.S. 123 (1968).

Greene filed a federal habeas corpus petition on November 8, 2004. On January 26, 2006, the magistrate judge recommended that the petition for writ of habeas corpus be denied as meritless, but recommended that a certificate of appealability on Greene's "confrontation clause" claim be granted. The Commonwealth filed objections. On March 28, 2007, the district court approved and adopted the Report and Recommendation.

In briefing to the Third Circuit, the Commonwealth defended Greene' conviction on three distinct grounds – (1) petitioner's confrontation clause claim was meritless, because before *Gray* the state court's method of redaction was not an objectively unreasonable application of United States Supreme Court precedent; (2) in any event, any "error" did not have a substantial and injurious effect on the verdict; and (3) the claim presented to the federal court on habeas review was not fairly presented to the state court and so was procedurally defaulted. On May 28, 2010, the Third Circuit Court of Appeals affirmed the decision of the district court, finding that the AEDPA standard of review precluded it from considering *Gray* in the

evaluation of the confrontation clause claim.[3] One judge dissented.

Greene now seeks review in this Court.

FACTORS BEARING ON THE REQUEST FOR REVIEW

The question presented arises infrequently and the decision below was clearly correct, but there is a two-circuit conflict and "uncertain" precedent, and the issue implicates the fundamental nature of deferential habeas review. Respondents do not oppose the grant of the petition.

Petitioner has overstated many of the arguments in favor of granting review of the decision below. On balance, however, respondents agree

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[3]The court rejected the Commonwealth's fair presentation argument in a summary fashion, stating that the "factual and legal substance" of the claim was before the state court, and since the state court dismissed on a "substantive" basis and not a "procedural" basis, the claim was exhausted. *Greene v. Palakovich*, 606 F.3d 85, 93 (3rd Cir. 2010). Later in the opinion, however, the court acknowledged that Greene's habeas claim under *Gray* was based on "a 'discrete legal ground,'" distinct from the issue adjudicated on direct appeal. *Id.* at 103 n.12.

that the case presents an issue that requires clearer guidance, and that, if wrongly resolved, will jeopardize a core principle of AEDPA's reform of federal habeas review.

A. The question presented arises infrequently.

Petitioner argues that cases like this one – where this Court announces a dispositive new rule of constitutional law in the narrow window between the last state court decision on the merits and the date that the judgment becomes final – are commonplace. Essentially, petitioner's calculus is that there are a lot of criminal defendants, that this Court keeps issuing "new rules," and that it takes a very long time before state court rulings become final.

These contentions add up to less than petitioner claims.

First, the pronouncement of "new rules" under *Teague v. Lane*, 489 U.S. 288 (1989), is the exception rather than the rule. And not all such new rules apply to a large class of defendants. Of those that are affected, many will still not be able to show error, or error that is not harmless. Thus, the class of criminal defendants that can hope to prevail by virtue of any new rule is confined.

That class is dramatically reduced by the relative brevity of the pre-finality period at issue here. Petitioner argues that cases can remain pending for months and years while the state court considers a petition for discretionary review or reargument. Potentially – but only if such a petition is timely filed to begin with; and the time periods for doing so are typically quite short. In Pennsylvania, for example, if a litigant does not seek allowance of appeal in the state supreme court within 30 days, the judgment of the state superior court will become final. Pa. R. App. P. 1113(a). Petitions for reargument must be filed within just 14 days. Pa. R. App. P. 2542(a).[4] Moreover, as a matter of Pennsylvania and federal law, defendants do not even have to seek discretionary review in state court in order to exhaust their claims for purposes of federal habeas review. *See Wenger v. Frank*, 266 F.3d 218, 224-25 (3d Cir. 2001) (Alito, J.).

The number of cases presenting the necessary confluence of events, therefore, is fairly small.

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[4]Petitioner cites a First Circuit case, *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), in which the court of appeals speculated that a prisoner's motion had remained pending, thus delaying "finality" under state law, for six years. On remand, the state supreme court concluded that, in fact, the motion became final twenty days after the last state court decision, not six years later. *Foxworth v. St. Amand*, 929 N.E.2d 286 (Mass. 2010).

In the fifteen-year period since the enactment of the AEDPA, petitioner can identify only three cases where the issue was even arguably decisive – the present case, *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010), and *Thompson v. Runnel*, 621 F.3d 1007 (9th Cir. 2010). Though petitioner cites other cases to suggest this issue recurs "frequently," the consideration of the "new" law discussed in each did not affect the outcome of the case. *Smith v. Spisak*, 130 S. Ct. 676 (2010) (assuming that *Mills* could be considered, the state court conclusion was not error); *Portalin v. Graham*, 624 F.3d 69 (2nd Cir. 2010) (en banc) (specifically finding that the court need not resolve the issue because reliance on *Blakely* did not change the outcome of the case); *Foxworth v. St. Amand*, 929 N.E.2d 286 (Mass. 2010) (the "new" law was not decided before the case became final).

Petitioner stumbles against the problem himself in arguing that his case presents a "perfect storm of facts" making it an "ideal vehicle" for certiorari. Yes, there was a "perfect storm": a new rule announced by this Court at just the right time, presenting just the right facts, that might actually have affected the resolution of petitioner's claim. But "perfect storms" do not happen that often.

B. The decision below was clearly correct.

Petitioner's attack on the holding of the court of appeals primarily comes down to his claim that it is inconsistent with *Teague v. Lane*: under *Teague*, a new rule is applicable if it is announced before the state court ruling becomes final; under the Third Circuit view, a new rule is applicable only if it is announced before the state court ruling is decided.

Surprisingly, however, petitioner fails even to cite this Court's controlling precedent on the relationship between *Teague* and the AEDPA statutory question at issue here. In *Horn v. Banks*, 536 U.S. 266 (2002), the Court made clear that "the AEDPA and *Teague* inquiries are distinct [citations omitted]. Thus in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis when the issue is properly raised by the state." *Horn*, 536 U.S. at 272. The AEDPA standard of review "bears only a slight connection to . . . *Teague*." *Williams v. Taylor*, 529 U.S. 420, 429-30 (2000).

The supposed conflict with *Teague*, therefore, is imagined. Under § 2254(d)(1), the habeas court must determine whether the state court unreasonably applied clearly established United States Supreme Court precedent. Petitioner does not even

begin to explain how a state court can act unreasonably by not accounting for precedent that has not yet been promulgated and that will break new ground when it is eventually written.

Petitioner insists that a precedent does not have to exist in order to be clearly established. But that is a head-spinning thought. Only in a twilight zone could a rule be binding before it has even been conceived. It is apparent that a lawyer's performance cannot be unreasonable if he fails to anticipate a change in the law.[5] Surely AEDPA provides at least the same consideration for state court judges.

In support of his position, petitioner spends considerable attention attempting to parse two one-sentence statements in *Williams v. Taylor*, 529 U.S. 362 (2000). The two sentences, however, were written by two different justices, in two completely different Parts of the Court's fractured opinion, on matters that were irrelevant to the Court's holding. It is unlikely that the justices were addressing even

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[5]*See, e.g., Sistrunk v. Vaughn*, 96 F.3d 666, 670-71 (3d Cir. 1996), *relying on Morse v. Texas*, 691 F.2d 770, 772 n.2 (5th Cir 1982); *Brunson v. Higgins*, 708 F.2d 1353 (8th Cir. 1983); *Honeycutt v. Mahoney*, 698 F.2d 213, 216-17 (4th Cir. 1983).

each other in these particular sentences, let alone the question now before the Court.[6]

Finally petitioner argues that the Third Circuit's ruling here, which simply follows the plain

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[6]In any case, since *Williams v. Taylor* the Court has stated over and over that the reasonableness of the state court determination is to be assessed under the law as of the time the determination was made. *See Schriro v. Landrigan*, 550 U.S. 465, 478 (2007) ("[i]n short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude . . . ."); *Bell v. Cone*, 543 U.S. 447, 453 (2005) ("[t]hese principles were plain enough at the time the State Supreme Court decided respondent's appeal."); *Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) ("[w]e look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'"); *Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (referencing as the relevant period "the time the Maryland Court of Appeals rendered the decision at issue in this case . . . ."); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) ("clearly established Federal law" under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision"). *See also Brown v. Payton*, 544 U.S. 133, 149 (2005) (Souter, J., dissenting) ("[a]t the time the Supreme Court of California took up Payton's direct appeal of his death sentence for homicide, it was settled law that . . ."); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-278 (2007) (Roberts, C.J., dissenting) ("What is pertinent under AEDPA, however, is whether federal law was clearly established by our decisions when the state court acted. *Williams, [529 U.S.] at 412, 120 S.Ct. 1495.* AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball").

language of the statute, will create "perverse incentives," inviting nefarious state supreme court justices to deny discretionary review in order to deprive deserving defendants of the benefits of new rules of law.

The more likely perverse results, however, run the other way. Under petitioner's approach, a state high court would be compelled to grant review whenever a new rule has been announced in the interim since the last state court decision. If it did not take review, the state judgment would be subject to virtually automatic nullification in federal court, because the state's failure to apply the new rule would be deemed unreasonable per se.

But if a state supreme court *must* allow discretionary review or risk almost certain extinction of the state judgment, then review is no longer discretionary. Like this Court, state courts have good cause to exercise their review powers in a discretionary fashion. In this case, for example, the Pennsylvania Supreme Court, after ordering briefing, discovered that petitioner had never actually challenged the use of blanks in the redacted statements, and had in fact agreed to them. That should have been more than adequate reason to dismiss the appeal as improvidently granted. Yet by doing so, according to petitioner, the state supreme court effectively waived its opportunity to apply the new rule, and thereby

rendered the ruling of the intermediate state court – which did not even know there was going to be a new rule – unreasonable under § 2254(d).

That could hardly be called deference.

C. The number of conflicting circuit court cases is small, but the conflict is real.

Petitioner contends that at least three circuits – the Sixth, the Ninth, and the First – have issued dispositive decisions that conflict with the ruling of the Third Circuit in this case. In fact only one precedential court of appeals opinion is in conflict with the decision here: *Miller v. Stovall*, 608 F.3d 913 (6th Cir. 2010).[7]

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[7]Petition for Writ of Certiorari pending, *Stovall v. Miller*, No. 10-851, filed December 21, 2010.

The Ninth Circuit opinion on which petitioner relies, *Thompson v. Runnel*, 621 F.3d 1007, 1015 n.7 (9th Cir. 2010). did not address the issue on the merits, instead ruling that the court could simply adopt petitioner's view for purposes of that case, because the state had not argued the question.

In the First Circuit opinion, *Foxworth v. St. Amand*, 570 F.3d 414 (1st Cir. 2009), the court's discussion of the issue was only theoretical, because the new rule in question there was announced after the case had become final – not during the "window" that defines the question presented

(continued

While the conflicting precedents are few, the conflict is genuine. There are also a number of court of appeals opinions that have addressed the issue in dictum, often taking conflicting views even within the same circuit.[8] There is no way to reconcile the cases without this Court's intervention.

The effect of the split, moreover, is magnified by this Court's recent opinion in *Smith v. Spisak*, 130 S. Ct. 676 (2010). That case involved the application of *Mills v. Maryland*, 486 U.S. 367 (1988), a new rule announced after the decision of the state supreme court, but before that decision became final. The *Spisak* Court acknowledged the existence of an issue in this regard, but stated that there was "some uncertainty" as to its proper resolution. 130 S. Ct. at 681. Resolution proved

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[7](...continued)
here.

[8]*Compare Harris v. Stovall*, 212 F.3d 940, 945 n. 2 (6th Cir. 2000), *with Miller v. Stovall*, 608 F.3d 913, 919-20 (6th Cir. 2010); *Newland v. Hall*, 527 F.3d 1162, 1198 n. 62 (11th Cir. 2008) (plurality) (Tjoflat, J.), *with Schwab v. Crosby*, 451 F.3d 1308, 1324 (11th Cir. 2006), *with Crawford v. Head*, 311 F.3d 1288, 1315 n.2 (11th Cir. 2002); *Jiminez v. Walker*, 458 F.3d 130, 146 (2d Cir. 2006), *and Harris v. Kuhlmann*, 346 F.3d 330, 341, 345 (3d Cir. 2003), *with Besser v. Walsh*, 601 F.3d 163, 184 (2d Cir. 2010), *rev'd sub nom Portalin v. Graham*, 624 F.3d 69, 81 n. 6 (2nd Cir. 2010) (en banc) (noting the absence of case law, but finding it unnecessary to reach the issue).

unnecessary there, because the state prevailed even on the assumption that the *Mills* rule was applicable.

Spisak's statement of "uncertainty," however, has already encouraged some lower court judges to adopt the flawed view advocated by petitioner here. *See, e.g., Greene v. Palakovich*, 606 F.3d at 110 (Ambro, J., dissenting); *Thompson v. Runnel*, 621 F.3d at 1015 n.7. Ironically, that view is apparently inconsistent with the sentiments that led to the discussion of this issue at oral argument in *Spisak*.[9] Nonetheless, until this Court

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[9]MR. CORDRAY: Thank you, Mr. Chief Justice, and may it please the Court:

Because this case arises under the deferential standards of the AEDPA statute, Mr. Spisak must show that the Ohio Supreme Court's decision was contrary to Mills v. Maryland or that it unreasonably applied Strickland v. Washington.

JUSTICE SOTOMAYOR: Why? I -- I have been trying to figure out why the State court would know in its decisionmaking that Mills commanded a different result when Mills was issued after the State denied its petition for rehearing.

MR. CORDRAY: It's a bit of a conundrum, Your Honor, because Mills was issued after the Ohio Supreme Court's decision here, but before it became final on direct review when cert was denied by this Court in March of 1989.

(continued...)

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[9](...continued)

JUSTICE SOTOMAYOR: Well, finality in that sense is generally looked at in terms of AEDPA statute of limitations. Why should the same rule apply to the question of whether a State has acted contrary to or unreasonably in light of Supreme Court precedent when the precedent didn't exist at the time it was rendering its decision? How can a court act?

* * *

JUSTICE ALITO: [Y]ou say that -- that the State court's decision was contrary to or involved an unreasonable application of clearly-established Federal laws determined by the Supreme Court of the United States, i.e., Mills v. Maryland, when Mills v. Maryland hadn't been decided.

MR. BENZA: In Terry Williams v. Taylor, this Court recognized in the opinion authored by Justice O'Connor that the issue for contrary to or unreasonable application is going to be governed by the application of Teague.

JUSTICE ALITO: And are there -- are there not quite a few instances of contrary statements in our opinions?

MR. BENZA: As to the application of Mills? Or --

JUSTICE ALITO: As to the -- as to the time when the -- the law has to be clearly established by a decision in that court.

MR. BENZA: No . . . .

(continued...)

eliminates the "uncertainty," *Spisak* casts an undeserved shadow over the court of appeals panel decision below. The only way to guarantee that the correct result here remains the law, and that the AEDPA deference provision remains intact, is through this Court's review.

D. This case is a suitable vehicle for resolution of this issue.

Respondents agree that the present case is an appropriate one in which to make clear that a state court cannot act unreasonably in failing to follow a precedent of this Court that did not exist at the time of the state court ruling. The "suitable vehicle" question, however, is more complex than the brief treatment given it by petitioner. Petition for Certiorari at 21.

That is because petitioner never presented his "new rule" claim to the state courts. He argued only a claim arising under the old rule, concerning contextual implication. The rule later established

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[9](...continued)

JUSTICE ALITO: This Court has not said that clearly established Federal law refers to this Court's decision as of the time of the relevant State court decision[?]

Smith v. Spisak, 2009 U.S. Trans. LEXIS 50, 1-3, 41-43 (U.S. Trans. 2009).

by *Gray v. Maryland*, concerning the use of blanks in redacted statements, was never identified by petitioner.

Normally, that should make this a bad case for this Court's discretionary review, because petitioner should not properly benefit from the ruling he seeks even if he were to achieve it. The failure of fair presentation here, however, is not mere error or oversight. Rather, it is *inherent* in cases raising the legal issue on which petitioner desires a writ of certiorari.

Litigants do not routinely argue for relief on the basis of rules that do not yet exist, because – like state court judges – they cannot reliably predict the ways in which legal ground will be broken in the future. As a result, most of the cases that would require resolution of the § 2254(d) question presented here will be cases in which the defendant did not raise a "new rule" claim until after the new rule was announced.

The lack of fair presentation, therefore, is not a prudential impediment to review, but an indication of the need for it. What happened here is typical: the state courts are being challenged for unreasonably determining an issue that was never actually before them. All the more reason to resolve the question reserved in *Spisak* and hold clearly that a federal habeas court may not overturn a state criminal judgment on the ground that

the state court did not foresee a future decision of this Court that creates a "new rule."

CONCLUSION

For these reasons, respondents do not oppose the grant of the petition for a writ of certiorari.

Respectfully submitted,

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RESPONDENT'S BRIEF

No. 10-637

In the Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Question Presented

Under AEDPA, can a state court's adjudication of a claim be "contrary to, or an unreasonable application of, clearly established law," where the state court could not have applied the rule of law in question because the rule did not yet exist?

Does the answer change merely because the new rule of law is announced after the state court has ruled, but before its judgment becomes technically "final" upon expiration of the time for filing a certiorari petition?

List of Parties

Petitioner

Eric Greene

Respondents

Jon Fisher, Superintendent, State Correctional Institution at Smithfield

The District Attorney of Philadelphia County

The Attorney General of the State of Pennsylvania

Table of Contents

Question Presented i

List of Parties ii

Table of Citations v

Statement of the Case 1

The crime and trial. 2

The direct appeal in state court. 4

The federal habeas corpus proceedings. 8

Summary of Argument 9

Argument 14

I. The *Teague* attack on AEDPA deference is a diversion. 14

A. Retroactivity v. res judicata. 14

B. Straw men and statutory construction. . 16

C. *Teague* and time limits. 17

II. The statutory provisions, and this Court's precedents, are clear. 18

A. Greene would undercut every important element of § 2254(d). 18

1. "Unreasonable application." 18

2. "Clearly established." 21

3. "Adjudicated on the merits." 23

B. Greene would overrule a full decade of this Court's deference decisions, from the last to the first. 27

1. *Cullen v. Pinholster*. 27

2. The "regrettably imprecise" cases. . 30

3. *Williams v. Taylor*. 33

III. AEDPA is not "unfair." 35

A. The state courts are not evil and ignorant. 35

B. Finality isn't "fair" either. 39

C. Habeas is not error correction. 42

Conclusion 45

Table of Citations

Federal Cases

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) 32

Abdullah v. Warden SCI Dallas, 2007 U.S. Dist.
LEXIS 99135 (E.D. Pa. 2007) 41

Abdullah v. Warden SCI Dallas, 2010 U.S. Dist.
LEXIS 11049 (E.D. Pa. 2010) 41

Bell v. Cone, 535 U.S. 685 (2002) 27

Bell v. Cone, 543 U.S. 447 (2005) 32

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) .. 26

Bobby v. Van Hook, 130 S. Ct. 13 (2009) 19

Brecht v. Abrahamson, 507 U.S. 619 (1993) ... 9,36

Bruton v. United States, 391 U.S. 123 (1968) 5

Carey v. Musladin, 549 U.S. 70 (2006) 31

*Chicot County Drainage District v. Baxter State
Bank*, 308 U.S. 371 (1940) 16

Coleman v. Thompson, 501 U.S. 722 (1991) 36

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) . *passim*

Danforth v. Minnesota, 552 U.S. 264 (2008) .16,36,38

Gray v. Maryland, 523 U.S. 185 (1998) ..... *passim*

Harrington v. Richter, 131 S. Ct. 770 (2011) . *passim*

Holland v. Jackson, 542 U.S. 649 (2004) 36

James B. Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) 16

Lockyer v. Andrade, 538 U.S. 63 (2003) 31,32

McDaniel v. Brown, 130 S. Ct. 665 (2010) 26

Medellin v. Texas, 544 U.S. 660 (2005) 27

Mills v. Maryland, 486 U.S. 367 (1988) . 19,20,21,22

Premo v. Moore, 131 S. Ct. 733 (2011) 20

Richardson v. Marsh, 481 U.S. 200 (1987) 5,6

Schriro v. Landrigan, 550 U.S. 465 (2007) 32

Smith v. Spisak, 130 S. Ct. 676 (2010) .. 19,20,21,22

Strickland v. Washington, 466 U.S. 668 (1984) 19,20,34

Teague v. Lane, 489 U.S. 288 (1989) ..... *passim*

Thompson v. Runnels, 2011 U.S. App. LEXIS 11945, (9th Cir. 2011) 9

Tyler v. Cain, 533 U.S. 656 (2001) 22

Wiggins v. Smith, 539 U.S. 510 (2003) 31

Williams v. Taylor, 529 U.S. 362 (2000) . . . . . *passim*

Yarborough v. Alvarado, 541 U.S. 652 (2004) . . . 31

Federal Statutes

28 U.S.C. § 2243 16

28 U.S.C. § 2244(b) 16

28 U.S.C. §2244(d) 16

28 U.S.C. § 2254(b) 20

28 U.S.C. § 2254(d) . . . . . *passim*

28 U.S.C. § 2254(3) 30

State Cases

Commonwealth v. Abdullah,
779 A.2d 1213 (Pa. Super. 2001) 41

Commonwealth ex rel. Berkery v. Myers,
239 A.2d 805 (Pa. 1968) 37

Commonwealth v. Cruz, 851 A.2d 870 (Pa. 2004) . 37

Commonwealth v. Finney, 742 A.2d 203
(Pa. Super. 1999) 41

Commonwealth v. Hargrove,
254 A.2d 22 (Pa. 1969) 37

Commonwealth v. Jenkins, 701 A.2d 779
(Pa. Super. 1997) 40

Commonwealth v. Womack, 706 A.2d 1261 (Pa. Super. 1997) 40

State Statute and Rule

42 Pa. Con. Stat. § 9545(b)(iii) 38

Pa. R. App. P. 1115(a)(3) 8

Pa. R. App. P. 1925(b) 4

Miscellaneous

Black's Law Dictionary (7th ed. 1999) 26

Jill E. Fisch, Retroactivity and Legal Change: An Equilibrium Approach, 110 Harv. L. Rev. 1055 (1997) 16

Statement of the Case

Eric Greene (or Jarmaine Trice, the name he used in state court) robbed a small grocery store with four accomplices. After one of the accomplices dispatched the owner by shooting him in the head, Greene picked up the cash register and walked out of the store with his friends to divide up the proceeds at home.

The perpetrators were arrested later, after another gunpoint robbery, and were tried together. Confessions by two of the perpetrators were edited to remove reference to the identities of the co-defendants. Greene's murder conviction and life sentence were affirmed on direct appeal by the Pennsylvania Superior Court.

After the affirmance, this Court decided a new case about the manner in which confessions must be edited in joint trials. Greene then for the first time raised objection to the manner of editing that was done at his trial, but the state supreme court declined to exercise its discretionary jurisdiction, and the federal habeas courts declined to apply a rule of law that did not come into existence until after the conviction had been affirmed.

Now Greene contends that he was entitled to the benefit of the new rule, even on federal habeas corpus review, because his conviction was not yet technically "final" when the rule was first announced.

The crime and trial.

Greene and his friends drove to Lilly's Market in Philadelphia in December 1993. One stayed behind in the car, with the engine running, while the other four entered the store. At least two were armed. Third Circuit App. 359-61.

The owner, Mr. Francisco Azcona, was crouched down behind the counter, while Mrs. Azcona and her sister stood in view. One of the gunmen went around the counter and fired. The victim held up his hand to block the shot, but the bullet passed through, entered his face, and severed his carotid artery. As the man lay dying, Greene picked up the cash register and carried it outside. He and his cohorts escaped in the getaway car. Joint App. 185-86; Trial Transcript, 2/26/96, 182-83.

Three days later, Greene and three of his accomplices committed another robbery, of a check cashing agency a few blocks away. Police interrupted their escape. Greene and his cohorts aimed their weapons at the officers, and a gun battle erupted. One of the weapons recovered by police proved to be the gun that had killed Francisco Azcona. Joint App. 186-87; Third Circuit App. 465-75, 480-81, 489.

All five participants in the grocery store murder were subsequently arrested and came to trial together. Three co-defendants had given inculpatory, but inconsistent, statements to police. Greene moved for severance on the ground that he would be prejudiced if tried together with the shooter, who was facing the death penalty. He also argued that the confessions could not be redacted. Joint App. 187.

At the pre-trial hearing on the motion, Greene reiterated his concern about spillover prejudice from the capital co-defendant, Joint App. 12-13, and then specified his objection to redaction. He argued that, if all the confessions appeared to indicate that the same person took the cash register, Greene would be contextually implicated as that person, because a civilian witness had identified him as the one who emerged from the store carrying the register. Joint App. 15-16.

The judge proposed a solution. She suggested that the confessions be redacted merely to say that "someone" took the cash register, so as to give no indication whether it was the same person. Greene responded that "your suggestion is brilliant." The judge further offered that different letters of the alphabet, such as X, Y, and Z, could be used to indicate that each confession had named a different person as the register-taker. Greene responded that the idea was "excellent," as long as the detective reading the statements at trial would be specifically instructed to use such letters in place of names. The judge asked if that would take care of the problem. Greene responded, "Agreed," while reminding the judge that he still sought severance because of the capital co-defendant. Joint App. 17-18.

In the end, it was not necessary to use letters. The Commonwealth planned to use only two of the confessions, and only one of those referred to the person taking the cash register. Joint App. 21-26. That statement was redacted to read that, after the shooting, "someone" grabbed the register. Similar phrases, such as "two guys," were used in both statements to replace all other references to specific

roles in the robbery (including the fact that Greene "was the leader" of the group and targeted the store to be robbed). In a few places, blanks were used. Third Circuit App. at 1052-1087.

Greene made no further objection to the method of redaction. During the trial, he contended that the prosecutor's summation had in effect unmasked the redactions by referring to the confessions in the context of the other evidence. Joint App. 113-19.

After a month-long proceeding, Greene was convicted of second-degree murder and sentenced to life imprisonment. Pennsylvania Rule of Appellate Procedure 1925(b) required him to file with the trial court a statement of matters to be complained of on appeal. Greene raised four issues in his statement, including his claim that he was prejudiced by joint trial with a capital co-defendant, and his claim that the prosecutor violated redaction. He made no complaint about blanks, symbols, letters, or anything else regarding the way the judge had edited the statements. Third Circuit Supp. App. 72-73.

The direct appeal in state court.

For non-capital criminal cases, Pennsylvania law provides for one direct appeal as of right, to the Pennsylvania Superior Court. Greene's brief there began with the required Statement of the Questions Involved, and presented three issues. Only the second question addressed severance, referring to the capital co-defendant and to the prosecutor's alleged "polluting" of the redaction. Joint App. 31.

In his Summary of Argument, Greene acknowledged that "[t]he redacted statements did not implicate him, but when the prosecutor argued in her closing as described, she in effect turned the confessions of the co-defendants into 'testimony' against him." Joint App. 40. He made the same point shortly thereafter: "If not polluted by the prosecutor's improper summation, the redacted confessions of the co-defendants would not have implicated him." Joint App. 42.

The main body of the brief was divided into three sections, corresponding to the Statement of the Questions Involved. The second section addressed severance. It consisted of a lengthy introductory passage, followed by four subsections of specific argument. Joint App. 45-70. In the introductory passage, Greene cited *Bruton v. United States*, 391 U.S. 123 (1968), and *Richardson v. Marsh*, 481 U.S. 200 (1987) (holding that possibility of "contextual implication," in itself, does not violate confrontation clause, but remanding to consider whether prosecutor's closing argument improperly undid effect of redaction). Joint App. 49-52. Of the following subsections, only the fourth addressed the confessions, focusing on the prosecutor's alleged misconduct in "violating redaction" during closing argument. Joint App. 64-70.[1]

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[1]Greene implies that the severance claim in his Superior Court brief embodied his current federal habeas corpus challenge to the specific manner in which the state trial judge edited the statements. Brief for Petitioner at 4. He lifts fragments of two sentences from the 43-page state court brief, concerning "narrative integrity" and "prejudice." He does not mention the

(continued...)

The Pennsylvania Superior Court issued a written opinion in December 1997, discussing and denying all of Greene's appellate claims. Joint App. 120-31.[2] Green filed a petition for allowance of discretionary appeal to the Pennsylvania Supreme Court. The petition was a somewhat abridged version of his superior court brief. As before, the only references to redaction concerned the prosecutor's alleged undoing of it in closing argument. Joint App. 133, 152-55.

While the petition for discretionary review was pending, this Court filed its opinion in *Gray v. Maryland*, 523 U.S. 185 (1998), on March 9, 1998. *Gray* addressed a question that had been noted, but not resolved, in *Richardson v. Marsh*, 481 U.S. at 211 n.5. The *Gray* Court approved redaction that replaces

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[1](...continued)
sentence that followed almost immediately afterward, which identified the prejudice in question as the result of "the prosecutor's unlawful tactics, as detailed, *infra*, in Argument II D." Joint App. 51-52.

Greene also fails to mention the pre-trial hearing, where he specifically *asked* for letters to be used in place of names, and "agreed" to the judge's "brilliant," "excellent" proposals. Nor does he mention the affirmative statements, in the Superior Court brief itself, where he explicitly acknowledged that, "[i]f not polluted by the prosecutor's improper summation, the redacted confessions of the co-defendants would have not have implicated him."

[2]Greene implies that, although he did not present any issue concerning obvious deletions such as letters, the Superior Court passed on that issue, because its opinion included a quote from another opinion that referred to the use of X's. Brief for Petitioner at 4-5. In fact the court's holding here addressed only the use of the neutral pronouns, such as "we" and "they," that removed any reference to the perpetrators' identities. Joint App. 128-29.

names with neutral pronouns, such as "a few other guys," but established a new rule prohibiting redaction with X's, blanks, and similar words or symbols. 523 U.S. at 196-97.

After *Gray*, Greene did not seek to supplement his discretionary appeal petition in order to bring the new case to the attention of the state court. On August 14, 1998, however, the court granted review to consider whether severance should have been granted because of confrontation clause concerns. Joint App. 156.

Greene filed a brief in the supreme court pursuant to the grant of appeal. Now for the first time he mentioned the manner in which the statements had been redacted. He complained that some names were substituted for the phrases "two guys" and "three guys," thus revealing the number of participants. Joint App. 165, 168-69. He noted that some names were replaced with blank spaces. Joint App. 169. He presented a seven-page block quote from the *Gray* opinion. Joint App. 171-78. But he also acknowledged that "the redacted statements did not implicate him explicitly (though they did by implication)," and complained again about the prosecutor's closing argument. Joint App. 167.

In its brief in response, the Commonwealth's primary contention was that "[d]efendant cannot, at this late stage, simply make a wholesale change of his argument in an attempt to benefit from a change in the law." His new claim was "never preserved in the trial court, the Superior Court, or even in his *allocatur*

petition." Joint App. 198.[3] The brief laid out in detail the record showing Greene's agreement to the redaction. Joint App. 192-94, 197-98.

After receiving the Commonwealth's brief, the Pennsylvania Supreme Court issued a one-line order in April 1999, dismissing the appeal as "having been improvidently granted." Joint App. 216.

Greene did not file a certiorari petition in this Court. Nor did he seek post-conviction review of the *Gray* issue in state court.

The federal habeas corpus proceedings.

Instead, he proceeded to federal habeas corpus review under 28 U.S.C. § 2254. The district court concluded that it could consider only established law as it existed at the time the state court had ruled on the claim. *Gray v. Maryland* therefore came too late and could provide no basis for declaring that the state court had acted unreasonably. The court denied relief. Cert. App. 72a-82a.

On appeal to the Third Circuit, the court of appeals agreed, after extensive analysis, that a state court could not unreasonably apply a Supreme Court precedent which it could not have known about at the time of its decision. Cert. App. 25a. The court then considered the merits of the confrontation clause claim

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[3] *Allocatur* is the traditional writ of discretionary review, now designated in Pennsylvania Supreme Court procedure as a "petition for allowance of appeal." *See* Pa. R. App. P. 1115(a)(3) (only questions set forth in the petition for allowance of appeal will be considered if appeal is allowed).

under the clearly established law available to the state court. The court of appeals noted that the confessions as edited were contradictory and confusing, and the evidence at trial was inconsistent not only about the roles of the individual accomplices, but also about their locations and total number. Under the circumstances, held the circuit, Greene was not directly implicated by the statements, and the Pennsylvania Superior Court reasonably determined that the trial judge's redactions and jury instructions complied with the confrontation clause.[4] Cert. App. 5a-9a, 42a-43a.

Greene filed a petition for certiorari in this Court. He urged the Court to follow the views of the Ninth, Sixth, and First Circuits on the question presented. The Court granted review.[5]

Summary of Argument

Congress hit the reset button on the relationship between state and federal judges when it passed the Anti-terrorism and Effective Death Penalty Act. The deference provision of the statute was written to ensure that the lower federal habeas corpus courts

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[4]Because the court of appeals resolved the claim under pre-*Gray* law, it did not reach the question of whether, even assuming *Gray* error, the minimal use of blanks in the redactions would have amounted to "substantial and injurious effect" under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

[5]Greene continues to rely on the the Ninth and First Circuit opinions in his merits brief, although he no longer cites the Sixth Circuit opinion. The Ninth Circuit recently denied rehearing en banc on this issue, over the votes of seven dissenting judges. *Thompson v. Runnels*, 2011 U.S. App. LEXIS 11945, 2011 WL 2279451 (9th Cir. 2011) (Callahan, J., dissenting).

could no longer favor their personal views of the law over the considered decisions of state courts reviewing the state's own criminal judgments. An indispensable element of such deference was to prevent the use of habeas review to blindside state court judges with evidence and rules that were not before them at the time.

Petitioner Greene seeks to upset AEDPA's new balance. He argues that § 2254(d) of the statute is merely a standard of review. Any temporal limit on the "clearly established law" required by that standard, he contends, would amount to a rule of retroactivity. But retroactivity, according to Greene, is already covered by the rule of *Teague* v. *Lane*. Therefore, concludes Greene, the Court must read AEDPA to mean that any pre-finality new rule qualifies as "clearly established law" – even if, in fact, the new rule was *not* established until well after the state court was actually adjudicating the claim.

Greene is wrong. Section 2254(d) is not merely a standard of review. In fact it is a "modified form of res judicata" that generally bars relief on claims that have been adjudicated on the merits in state court. Res judicata, when it attaches, obviously imposes a "temporal limit" on the availability of new law that would otherwise be applicable but for the res judicata bar. And res judicata, when it attaches, accordingly supersedes otherwise applicable rules of retroactivity.

This means that the deference rule will indeed limit the impact of *Teague* in some habeas cases; and in others, such as those in which there was no state court merits determination, it will not. But Congress had every right to create more than one kind of

limitation on the universe of applicable law under § 2254(d) – and it did not have to leave behind a trail of statutory history crumbs to do so.

That leaves the plain language itself. The act requires rejection of habeas claims unless the state court ruling was "unreasonable." Greene says habeas courts can honor this requirement by way of a thought experiment: superimpose a new rule of law on an old state ruling, and then just project forward to imagine what a "reasonable" state court judge would have done had he actually known about the new rule. Reasonable, however, means reasonable under the circumstances. And under the circumstances means the circumstances as they were, not as they might become at some future point.

The act also requires the habeas court to apply only the "clearly established" law in its deference review. Greene says "clearly established" just means "not dicta." It is true that dicta are not allowed in deference analysis; but that restriction is accomplished by the very next words of the statute – the "law" as it is "determined" by this Court. "Clearly established" is used in the past tense, and the past to which the phrase must refer is the past at the time the state court was attempting to ascertain the law it was supposed to follow.

The act requires habeas courts to defer to state court decisions resulting from an adjudication "on the merits." Greene says a state supreme court's denial of discretionary review should be treated as a "decision" "on the merits"; that way a new rule announced before the "decision," but too late for the real state court adjudication in the intermediate appellate court, will

still be eligible for federal habeas review. The argument amounts to a modest proposal to do away with discretionary jurisdiction in the state courts. The essence of such jurisdiction is the power to decline review *without* expression of opinion on the merits. Not a thing in the logic or language of the statute permits Greene's perplexing insistence that a non-decision can simply be deemed to be a decision on the merits.

Greene's campaign against plain meaning would also require the Court to depart from repeated precedents directly on point. The most recent, *Cullen v. Pinholster*, held that § 2254(d)(1) is "backward-looking," and that evidence not available to the state court therefore cannot be considered in applying the deference rule. That rationale applies even more strongly when it is law, rather than facts, that is unavailable. After all, (d)(1) is *about* "law." The "law" in question is the law that was available to the state court.

And this Court has said exactly that, in a variety of ways, in a continuous line of authority stretching back to the original deference decision in *Williams v. Taylor*. That decision held that the statute goes beyond *Teague* to create a distinction between "unreasonable" and "erroneous." "Unreasonable," said the *Williams* Court, is a common term in the law. And, as the Court had previously made clear, one of the things that it commonly means is that the reasonableness of a decision must be assessed under the circumstances as of the *time* of the decision.

Nor do any legitimate equities support Greene's desire for a different result. Greene says we cannot

trust state courts to apply pre-finality new rules unless they are subject to a federal habeas overseer. But that is a tired view of the state court systems, outmoded even before AEDPA. Indeed, the state courts in Greene's case would likely have provided him with post-conviction review of the new rule in question – but he didn't ask for it. Instead he asks this Court for a rule that would allow him and those like him to proceed directly to federal habeas court, in place of pursuing state court remedies.

Greene argues that such a rule is needed because only a "finality" cutoff can supply true fairness for similarly situated defendants. But any kind of "temporal cutoff' cuts someone off. Even in Greene's own case, his co-defendants received varying results – because their cases became "final" at different times. The real class of similarly situated defendants relevant here is the one defined by AEDPA: those who had state court merits review under the same set of legal rules.

In the end, what Greene expects is a guarantee of error correction for the very small number of cases that fall into what he has called a "perfect storm" of events like those here. If this Court will not provide that guarantee itself, he contends – through certiorari review – then it must make state courts provide it – through artificial "merits" non-decisions – so that federal habeas courts can exercise a final layer of review.

But that is not the review that AEDPA establishes. State courts need not see ahead to cases not yet decided and rules not yet conceived. And federal

courts, looking back in judgment, must adjust their vision accordingly.

Argument

I. The *Teague* attack on AEDPA deference is a diversion.

This is Greene's statutory construction argument:

- Retroactivity requires some "temporal cutoff";
- Section 2254(d) is not about retroactivity;
- It therefore follows that section 2254(d) cannot have any temporal cutoff.

There are fancy names for this kind of illogic – fallacy of the illicit minor, or perhaps fallacy of the undistributed middle – and a fancy case Greene constructs from it. But it is false. The deference provision is a form of res judicata and therefore, like any relitigation bar, sometimes limits the reach of new law that would otherwise receive retroactive effect. That is why AEDPA's purported failure to "alter" the *Teague* rule is meaningless, indeed is misdirection. *Teague* continues to operate as before – whenever the deference provision does not apply instead.

A. Retroactivity v. res judicata.

Although he does not say so openly, the real starting point of Greene's presentation is that any rule preventing application of new law – after a given point in time – must be a rule of retroactivity. *Teague v. Lane*, 489 U.S. 288 (1989), created a rule of

retroactivity for collateral review, of course, and therefore, says Greene, it must be the *only* way in which the habeas statute regulates the use of new law by a federal court reviewing a state criminal judgment. *Teague* occupies the field, silently preempting any other new-law limitation in the act, at least unless Congress expressly dictates otherwise. Section 2254(d) does not qualify as such an explicit effort to trump *Teague* because, Greene asserts, it is just a "standard of review."

But the deference provision is *not* just a standard of review. As this Court noted in *Harrington v. Richter*, 131 S. Ct. 770 (2011), § 2254(d) is a "relitigation bar" – a "modified form of res judicata." *Id.* at 785, 786. The statute stops just "short of imposing a complete bar to federal court relitigation of claims already rejected in state court proceedings." *Id.* at 786. Review is prohibited "unless one of the exceptions to § 2254(d) applies." *Id.* at 787. The "standard of review" on which Greene relies is merely one of these exceptions to the general rule by which the statute gives preclusive effect to state court decisions. The end result, as embodied in the deference provision, is that "habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Id.* at 786 (internal quotation marks omitted).

There was no need, therefore, for Congress to explicitly target *Teague* in order to give "temporal" effect to § 2254(d). A res judicata rule necessarily operates as a temporal cutoff when it applies; but that does not make it subservient to retroactivity rules. Quite the contrary. Even when new law is given "full" retroactivity – the broadest form – "once suit is barred

by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940).[6] Retroactivity does not foreclose res judicata.

B. Straw men and statutory construction.

The heart of Greene's brief is a detailed accounting of various means by which Congress, in promulgating § 2254(d), did not say anything about changing retroactivity law. First he goes through all the ways in which the statutory language does not overrule *Teague*. Brief for Petitioner at 21-27. Then he goes through all the ways in which the legislative history does not overrule *Teague*. Brief for Petitioner at 27-29.

But these are the answers to an irrelevant question. *Teague* may well be "grounded in" § 2243 of the habeas statute, as the Court stated in *Danforth v. Minnesota*, 552 U.S. 264, 278 (2008), two decades after *Teague* was decided. But the retroactivity rule did not thereby commandeer all neighboring sections of the act. The statute's provisions interact and sometimes overlap in effect. A successive petition may be barred under § 2244(b) even if it was timely filed under § 2244(d). An unexhausted claim is unreviewable even if the state court ruling appears to be contrary to controlling law.

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[6] Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1079 n.148 (1997) ("The temporal reach of nominally retroactive rules may be limited by a variety of doctrines, including res judicata").

Similarly, section 2254(d) does not improperly infringe on *Teague* simply because the deference rule comes into play at an earlier point in time, and therefore makes it unnecessary to reach retroactivity in some cases. No special dispensation from Congress is required for this result, beyond the existing words of the statute.

C. Teague *and time limits.*

Greene nonetheless maintains that, if § 2254(d) is given its proper effect, it will "abrogate" the *Teague* retroactivity rule. In reality, *Teague* still has plenty to do under AEDPA.

There are many cases, for example, in which there was no adjudication on the merits in state court. In these cases, § 2254(d) does not apply at all, and *Teague* supplies the time frame for judging the applicability of any relevant new law. In this respect it plays a role akin to that of § 2254(e) under *Cullen v. Pinholster*, 131 S. Ct. 1388, 1401 (2011) ("At a minimum, therefore, § 2254(e)(2) still restricts the discretion of federal courts to consider new evidence when deciding claims that were not adjudicated on the merits in state court").

There may be other situations in which there was a merits adjudication on state collateral review, or in which the state court on direct review assumed the existence of a new rule that was not actually adopted by this Court until after final judgment in the state case. *See Cullen v. Pinholster*, 131 S. Ct. at 1412 (Breyer, J., concurring in part and dissenting in part). In all these circumstances, *Teague* will provide the ground for decision. If that amounts to an abrogation

of the judge-made *Teague* rule, "partial" or otherwise, so be it; that is what statutory amendments do. AEDPA changed habeas.

II. The statutory provisions, and this Court's precedents, are clear.

While § 2254(d) is a res judicata provision, Congress did not simply incorporate common law res judicata principles by reference. Rather, the deference provision is a "modified form" of res judicata. Its proper operation can be understood only by giving fair meaning to its actual language and the precedents of this Court that have applied it. Greene would instead radically rewrite both.

A. Greene would undercut every important element of § 2254(d).

Greene invokes various principles of statutory construction. He should have started with the first: plain meaning. In every instance, he tries to replace the natural and customary usage of the language with a result-oriented contrivance.

1. "Unreasonable application."

The statute commands that state courts may not be reversed on habeas unless they acted unreasonably when they applied federal law. This is a major hurdle for Greene's position. As this Court has observed over and over, how can a judge possibly be tarred as "unreasonable" for not knowing about a rule that does not yet exist?

Not a problem, says Greene. We can just *pretend* that the new rule existed at the time of the state adjudication, and then just *imagine* what a reasonable court would have done with that new rule, had it in fact existed at the time the court was deciding. After all, contends Greene, isn't that what we do when the state court has not issued an opinion? Isn't that what this Court itself did in *Smith v. Spisak*, 130 S. Ct. 676 (2010), when it rejected the defendant's *Mills* claim[7] even though *Mills* was only decided after the state court had ruled?

No, and no. There is a difference between hypothetical and *contra-factual*. It is one thing to apply an objective rather than a subjective standard – to determine whether a given result lies within a wide range of reasonable outcomes, even if the magistrate in question may not have had the right thoughts in his head. It is quite another thing to judge a judge against a scenario that is *flatly untrue* – to put a finger on the clock hands, wind forward, and act as if the future was always here.

The Court has recognized that this is not how reasonableness review is done. In creating a standard for reckoning the effective assistance of counsel, this Court has been very clear. An attorney's decisions must be assessed on the basis of the universe of information available to him at the time: what he knew or should have known. *Strickland v. Washington*, 466 U.S. 668, 689-91 (1984). Consider only the "norms prevailing *when the representation took place*." *Bobby v. Van Hook*, 130 S. Ct. 13, 16

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[7] *Mills v. Maryland*, 486 U.S. 367 (1988).

(2009) (emphasis supplied). Respect the court's "limited role in determining whether there was manifest deficiency in light of information *then available to counsel*." *Premo v. Moore*, 131 S. Ct. 733, 741 (2011) (emphasis supplied). Above all else, "eliminate the distorting effects of *hindsight*." *Strickland*, 466 U.S. at 689 (emphasis supplied).

That is at the very essence of the endeavor. Yet Greene proposes precisely the opposite for state court judges. Surely AEDPA was not intended to give less deference to the entire state judicial establishment than it would to a novice young lawyer who just passed the bar.

There is an additional artifice in Greene's argument. It may well be possible, as a purely intellectual exercise, to imagine what a state court would have done with precedent-to-be, and either to agree or disagree with that imaginary result. As a matter of law, however, such an exercise is not permitted under AEDPA. The statute is not symmetrical. Subsection (d) is a limitation on the *grant* of relief, not the denial of relief. A habeas court is free to reject a claim on the most convenient ground, *see, e.g.*, 28 U.S.C. § 2254(b) (claim may be denied on merits even if unexhausted), just as an appellate court is free to affirm a judgment for any reason.

That is all this Court did in *Spisak*. The defendant there was not entitled to relief, even on the generous assumption that *Mills* applied to his case. There was no need to reach the unbriefed issue of whether *Mills* came too late to matter.

Now Greene tries to turn that unremarkable outcome into a rule that a federal habeas court can, in effect, *reverse* for any reason. To that end he misuses the Court's recent opinion in *Harrington v. Richter*, 131 S. Ct. at 786, quoting it for the proposition that "a habeas court must determine what arguments or theories . . . *could have* supported[ ] the state court's decision." Brief for Petitioner at 35 (emphasis added by Greene). He italicizes the wrong words. Under AEDPA, the question is whether reasonable analysis could have *supported* the state court's decision – not whether it could have undermined, invalidated, or thwarted the state court's decision. If *either* result is reasonable, the claim fails.

That is what "unreasonable application" means.

2. "Clearly established."

Greene faces a second impediment, in the statute's mandate that the state court ruling may be gauged only against a legal framework that is "clearly established." Greene again insists that this language is no real concern. The one and only thing it could mean, he contends, is that the applicable law must consist of actual holdings, as opposed to dicta. According to Greene, "clearly established" has nothing at all to do with the "temporal cutoff" issue he presents.

But this assertion ignores the case that anticipated the question on which certiorari has now been granted. In *Spisak*, both the parties and the court below assumed that *Mills* applied, although it was not decided until after the state supreme court ruling. This Court questioned that assumption, both at

argument and in the opinion, stating the issue this way: "whether *Mills* was clearly *established* for the purpose of reviewing the Ohio Supreme Court's opinion." 130 S. Ct. at 681. The italics are the Court's. Plainly the Court believes that the emphasized language does have something to do with the matter.

Any other reading would leave "clearly established" meaningless. If Congress had merely wished to preclude the use of dicta, as Greene suggests, it could have left out this phrase altogether. The remaining words would then provide that state court judgments could be overturned on the basis of "*law*, as *determined* by the *Supreme Court of the United States*." A statement of obiter dictum is – by definition – not "law." Dicta can be suggested, even pronounced; but in no genuine sense can they be "determined" – any more than they can be "established." *See Tyler v. Cain*, 533 U.S. 656, 664 (2001) (in the context of § 2254(d)(1), "determined" is a synonym for "held").

And if, in the past, lower federal courts invoked dicta from this Court to grant habeas relief, then the "law" on which they were relying was really just their own interpretations of the dicta, which then became "law" only in the sense that the lower federal courts held them to be so. The reason they can no longer do that is not because of "clearly established"; it is because of "Supreme Court of the United States."

Thus the actual statute plainly goes further than Greene admits. It does not limit federal habeas courts merely to "law," as determined by this Court; it requires that the law must have been "clearly established" – *established*, in the past tense. The only point in the past to which the grammar could logically

refer is the point at which the state court was adjudicating the claim. If Congress had instead been referring to the later point in time at which the state court judgment became final, the words "clearly established" would be superfluous, because *Teague* would supply the necessary cutoff. If Congress had been referring to the even later point in time at which the federal habeas court is reviewing the state court decision, the extra language would be nonsensical, because *Teague* would long before have drawn the line. The truth is the contrary of Greene's argument: the *Teague* rule is further sign that "clearly established" limits deference review to the law available to the state court.

3. "Adjudicated on the merits."

Perhaps Greene's biggest problem is that the object of AEDPA's deference requirement is a state court adjudication "on the merits." Greene wants the deference provision to focus on the denial of discretionary review by the highest state court. But how can a denial of discretionary review be on the merits?

Greene's answer is to propose another fiction: habeas courts can just *pretend* that the denial is a merits disposition. If a new rule comes down after a decision by the state intermediate appellate court, but before the judgment becomes final, the federal habeas court will simply apply the rule *as if* the state's discretionary review process were itself a merits adjudication.

Greene suggests that this is not much of an intrusion; after all, he would still allow the state high

court a number of options in this situation. The court could grant review, or make a procedural default ruling, or remand to the intermediate court. Petitioner's certiorari reply brief at 9-10.

But none of Greene's options include the one act that characterizes discretionary review – the unreviewable power simply to step aside and leave the resolution below as the last decision in the case. A court with discretionary jurisdiction may choose to deny review for any number of reasons that have nothing to do with whether the litigant is entitled to relief: because the lower courts are not in conflict, for example; because a different case presents the same issue in a clearer fashion; even just because the court's calendar is full for the term. In Greene's world, however, any such disposition would have exactly the same effect under § 2254(d) as if the high court had taken the case and ruled on the merits.

Presumably, at least *this* Court would still be entitled to employ true discretionary review (although more on that below). The Court has been most insistent about the nature of the process: "[a]s we have often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case. The[re are a] variety of considerations that underlie denials of the writ." Ironically, the name of the case in which the Court said these words is *Teague v. Lane*, 489 U.S. at 296 (internal quotations and citations omitted). Even more ironic: in the name of *Teague*, Greene now declares that Congress must have intended AEDPA to strip every state high court of the power that this Court exercises routinely. That does not sound like comity.

Yet Greene insists he has a textual basis for exactly this result. Section 2254(d) bars relief on a claim that was adjudicated on the merits, unless the adjudication resulted in a decision that was contrary to or an unreasonable application of clearly established federal law. Greene contends that the statute uses the words "adjudication" and "decision" to describe two different stages of appellate review. An "adjudication" must be the thing an intermediate state appellate court does, and a "decision" must be the thing a state supreme court does. Brief for Petitioner at 23-24, 48-49. Voilà – the applicable law becomes the law as of the time of the state supreme court "decision," even though the decision wasn't a decision at all, but simply a decision not to decide.

This is spurious on several levels. Greene spends the bulk of his brief arguing that Congress was not even thinking about "temporal cutoffs" in § 2254(d); that was all left to *Teague*. Yet now we are to believe that the statute carefully distinguishes between "adjudication" and "decision" for the precise purpose of enshrining Greene's views about the appropriate body of law to be employed in deference review.

And Congress supposedly did this even though, in the vast majority of cases, the distinction would be completely meaningless. For that great bulk of cases, there will be no new rule of constitutional law that intervenes between the last reasoned state court ruling and the point where the judgment becomes final. For those cases – the typical cases – the language as Greene now interprets it would make no sense at all.

Meanwhile, in that unusual case, like this one, in which there is an intervening new rule, Greene's

reading would turn the logical functioning of the statute inside out. The state court that considered and resolved the merits of the claim – the intermediate appellate court – would get no deference, because its ruling would be deemed a mere "adjudication." The state court that "import[ed] no expression of opinion upon the merits of the case" – the highest state court – would get full deference, because its denial of discretionary review would be deemed a "decision." But such deference would be empty, because the "decision" was really a non-decision.

All these mental contortions are necessary only if the purpose of statutory construction is to reach a pre-determined policy result. A truer approach would simply follow the plain meaning of the language. An "adjudication" is "the legal *process* of resolving a dispute; the *process* of judicially deciding a case." BLACK'S LAW DICTIONARY at 42 (7th ed. 1999) (Bryan A. Garner, editor) (emphasis supplied). A "decision" is "a judicial determination *after* consideration of the facts and the law, esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case." *Id.* at 414 (emphasis supplied). That is all AEDPA meant by "adjudication" and "decision": a process followed by a result. And that is why this Court has used the words interchangeably in applying the provision.[8]

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[8] *See, e.g., Berghuis v. Thompkins*, 130 S. Ct. 2250, 2258 (2010) ("a federal court cannot grant a petition for a writ of habeas corpus unless the state court's *adjudication* of the merits was 'contrary to, or involved an unreasonable application of, clearly established Federal law'") (emphasis supplied); *McDaniel v. Brown*, 130 S. Ct. 665, 674 (2010) (per curiam) ("As respondent

(continued...)

There is no secret code. Section 2254(d) requires deference to the last ruling on the merits, under the established law as the state court could reasonably have understood it at the time.

B. *Greene would overrule a full decade of this Court's deference decisions, from the last to the first.*

In addition to doctoring the plain language of the statute, Greene's position would require the Court to abandon, or reinvent, more than half a dozen of its prior rulings.

1. *Cullen v. Pinholster.*

The ink is barely dry on one of the Court's most important examinations of § 2254(d) – *Cullen v. Pinholster*. Greene, however, is already ready to mischaracterize the opinion's rationale. He describes the Court as holding that "the 'backward-looking' nature of Section 2254(d) means that federal habeas review 'is limited *to the record* that was before the

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[5](...continued)
acknowledges, in order to prevail on this claim, he would have to show that the state court's *adjudication* of the claim was 'contrary to, or involved an unreasonable application of, clearly established Federal law'") (emphasis supplied); *Medellin v. Texas*, 544 U.S. 660, 664-65 (2005) ("with respect to any claim the state court 'adjudicated on the merits,' habeas relief in federal court is available only if such *adjudication* 'was contrary to, or an unreasonable application of, clearly established Federal law'") (emphasis supplied); *Bell v. Cone*, 535 U.S. 685, 698 (2002) ("we find no merit in respondent's contention that the state court's *adjudication* was contrary to our clearly established law") (emphasis supplied).

state court that adjudicated the claim on the merits.'" Brief for Petitioner at 35 (emphasis added by Greene). Therefore, says Greene, *Pinholster* indicates that *only* the "factual record must be fixed at the time of the state-court adjudication" – but *not* "the universe of applicable law." Brief for Petitioner at 35-36.

This is a misleading account of the case. What the Court actually said about "backward-looking" is this: "Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made." 131 S. Ct. at 1398.

In other words, it is the statutory provision *as a whole* that is backward looking. It is the state-court decision *as a whole* that must be examined as of the time it was made. That is why "it follows," said the Court, *id.*, that deference review may consider only the facts that were available to the state court. The statute is not backwards looking because it is limited to the then-existing factual record; rather, the statute is limited to the then-existing factual record because it is backward-looking.

For exactly the same reason, "it follows" that deference review may consider only the *law* that was available to the state court. Perhaps, before *Pinholster*, the scope of the factual record under § 2254(d) was subject to reasonable debate. After *Pinholster*, however, there is simply no rational argument about the universe of applicable law. If the statute limits even the applicable facts because we must examine "the state-court decision at the time it

was made," then it plainly limits the applicable law in the same way.

But this is not the only point on which Greene's position is irreconcilable with the Court's recent *Pinholster* precedent. He would also contradict the case in a second, more silent, fashion. Crucial to Greene's claim is his contention that it is perfectly appropriate to assess the state court decision, even on the basis of law that did not yet exist, by simply imagining what a reasonable court would have done with the new law. Brief for Petitioner at 12, 34-35. As it happens, this argument exactly mirrors, without attribution, a portion of the *Pinholster* dissent. 131 S. Ct. at 1419.

Greene does not note, however, that the Court explicitly considered and rejected this point in *Pinholster*. "What makes the consideration of new evidence strange is not how 'different' the task would be, but rather the notion that a state court can be deemed to have unreasonably applied federal law to evidence it did not even know existed. We cannot comprehend how exactly a state court would have any control over its application of law to matters beyond its knowledge. Adopting [this] approach would not take seriously AEDPA's requirement that federal courts defer to state-court decisions and would effectively treat the statute as no more than a 'mood' that the Federal Judiciary must respect." 131 S. Ct. at 1399 n.3.

The Court's reasoning applies with even greater force to new law than it does to new facts. Indeed Greene can take no comfort even from the dissent in *Pinholster*. The central concern of the dissenters,

relying on §§ 2254(d)(2) and (e)(2), was that the structure of the statute treated facts differently than law for purposes of deferential review. 131 S. Ct. at 1419-20 (Sotomayor, J., dissenting); *id.* at 1411 (Alito, J., concurring in part). Greene's view lacks even that statutory support, and he is left with nothing more than the "strange ... notion that a state court can be deemed to have unreasonably applied federal law [that] it did not even know existed." *Id.* at 1399 n.3. Adopting this approach would not take seriously the Court's decision in *Pinholster*.

2. The "regrettably imprecise" cases.

This Court has repeatedly stated exactly the opposite of Greene's position here: the reasonableness of the state court determination is to be assessed under the law as of the time the determination was made. Greene is a bit stingy in acknowledging these cases. He mentions six of them; in fact there are at least nine. Whatever the number, though, Greene dismisses them all. He says the Court did not really have to decide this issue in any of those opinions, and that they therefore merely reflect the use of "regrettably imprecise language" that somehow found its way into the case law and can now be safely ignored. Brief for Petitioner at 34.

The origin of the problem, Greene contends, is Justice O'Connor's supposedly slapdash statement for the Court in *Williams v. Taylor*, 529 U.S. 362, 412 (2000): clearly established law for purposes of § 2254(d) is limited to "this Court's decisions as of the time of the relevant state-court decision." Ever since, according to Greene, the Court has simply echoed back this statement, which was no more authoritative than

the remark made to opposite effect by Justice Stevens in a different part of the *Williams* opinion.

To be sure, the Court has on occasion quoted Justice O'Connor's opinion directly. *See, e.g., Carey v. Musladin*, 549 U.S. 70, 74 (2006). More commonly, however, the Court has used new language to reinforce this basic principle of AEDPA:

- "'Clearly established law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."
  Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003).[9]

- "The amendments to 28 U.S.C. § 2254, enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), circumscribe our consideration of Wiggins' claim and require us to limit our analysis to the law as it was 'clearly established' by our precedents at the time of the state court's decision."
  Wiggins v. Smith, 539 U.S. 510, 520 (2003).[10]

- "These principles were plain enough at the time the State Supreme Court decided respondent's appeal."

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[9] *See also Yarborough v. Alvarado*, 541 U.S. 652, 661 (2004) (quoting *Lockyer*).

[10] *See also* the dissent in *Wiggins*: "the Court relies upon a case ... that *postdates* the Maryland court decision.... [That case] was not clearly established Supreme Court precedent *as of the time of the state court's decision*." 539 U.S. at 542-43 (Scalia, J., dissenting) (all emphasis in original).

Bell v. Cone, 543 U.S. 447, 453 (2005).[11]

- "In short, at the time of the Arizona postconviction court's decision, it was not objectively unreasonable for that court to conclude that" the petitioner's claim was without merit.
  Schriro v. Landrigan, 550 U.S. 465, 478 (2007).

- "As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law."
  Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).

And most recently, the Court explicitly relied on and extended this principle in order to reach the holding in *Cullen v. Pinholster*. Quoting from *Lockyer v. Andrade*, the *Pinholster* Court reasoned that, since "[s]tate-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision,'" so also must state-court decisions be measured against the existing factual record as of the time the state court renders its decision. The Court characterized *Lockyer* as one of its "precedents interpreting [§ 2254(d)(1)]." 131 S. Ct. at 1399.

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[11] *See also Abdul-Kabir v. Quarterman*, 550 U.S. 233, 277-78 (2007) (Roberts, C.J., dissenting): "What is pertinent under AEDPA, however, is whether federal law was clearly established by our decisions when the state court acted.... AEDPA requires state courts to reasonably apply clearly established federal law. It does not require them to have a crystal ball."

All this should certainly complicate Greene's effort to play down this entire line of authority as mere dicta. But he has an additional obstacle. If these many and carefully worded statements were not the considered judgment of the Court about the proper interpretation of the deference provision, if they were just accidental asides, then why did the Court keep echoing Justice O'Connor's opinion? Why didn't it ever echo Justice Stevens' opinion?

3. *Williams v. Taylor*.

The answer goes back to the beginning – *Williams v. Taylor*, the Court's first detailed analysis of § 2254(d). The case is a contest between two conflicting views of AEDPA.

Justice Stevens, in dissent, would have held that Congress meant no more than to "prohibit[ ] reliance on 'new rules'" in accordance with *Teague*, 529 U.S. 379-80, that the statute does not distinguish "between what is 'wrong' and what is 'unreasonable,'" *id.* at 387 n.13, and that a federal habeas court cannot defer to state court rulings that the federal judge thinks are "in error," *id.* at 387. The new statutory provisions merely "express a 'mood.'" *Id.* at 386.

Justice O'Connor's opinion, for the Court, held that § 2254(d) goes beyond the *Teague* rule, *id.* at 411-12, by establishing "that an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law." *Id.* at 412 (emphasis in original). The opinion described this as "the most important point." *Id.* at 410. And one of the most important ways in which *unreasonable* is different from *incorrect* or *erroneous* is that it limits the

applicable law to "this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412.

That concept – the repudiation of retrospective judgment – is an essential attribute of what it means to assess reasonableness rather than erroneousness. "The term 'unreasonable' ... is a common term in the legal world and, accordingly, federal judges are familiar with its meaning." *Id.* at 410. They are particularly familiar with its meaning from Justice O'Connor's opinion in *Strickland v. Washington*. As the Court held there, "[a] fair assessment ... requires that every effort be made to ... reconstruct the circumstances ... and to evaluate the conduct from counsel's perspective *at the time*." A court "must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed *as of the time of* counsel's conduct." 466 U.S. at 689-90 (emphasis supplied).

So it is no accident that, in *Williams*, Justice O'Connor's opinion referred to the law *as of the time of* the relevant state court decision. The opinion may not have been contemplating the precise circumstances presented here. But those circumstances are just an illustration of the general rule: there is no second-guessing in AEDPA. Not, at least, under the prevailing position in *Williams*. And that is why the later cases keep reiterating Justice O'Connor's approach instead of Justice Stevens'. The Justice Stevens approach lost.

Now Greene styles his claim as if it is a missing piece, an issue overlooked in the Court's prior precedents. But the truth is that both sides in *Williams* understood the stakes. Both knew that the

majority view of "unreasonable application of clearly established law" would draw the line at a different point than final judgment. When Greene contends that "unreasonable" does not mean contemporaneous, when he argues that *Teague* is the only "temporal cutoff" in the statute, he is not addressing an open question. He is challenging first principles.

III. AEDPA is not "unfair."

Greene and his friends of court, the criminal defense attorneys, complain that AEDPA is unfair unless it is interpreted as they urge. Even assuming the Court were free to ignore the statute's words and wished to overrule its prior precedent, they would be wrong.

A. The state courts are not evil and ignorant.

Greene maintains that the Court must, as a policy matter, treat new law as old law if it comes out after the merits adjudication but before final judgment. Otherwise, he warns, state supreme courts will "strip" defendants of their fundamental right to federal habeas review, either "intentionally or unintentionally." Brief for Petitioner at 37. Apparently we are to envision the state courts sitting in their chambers, twirling their mustachios as they deny discretionary appeals. And when they are not intentionally "evad[ing]" and "flout[ing]" their constitutional duties, Amicus Brief for Petitioner at 15, they achieve the same end through indolence, "depriv[ing] the defendant of his ability to seek federal habeas relief by dismissing the case ... as a means of docket management." Brief for Petitioner at 38-39.

But we are long past the time when the habeas corpus statute may be understood to regard the state judiciary as an inferior species. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (recognizing, even before AEDPA, that "federal and state courts are equally bound to guard and protect rights secured by the Constitution"); *Brecht v. Abrahamson*, 507 U.S. 619, 636 (1993) (rejecting argument "that state-court judges are ignoring their oath [and] violating their Article VI duty to uphold the Constitution"); *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam) (federal habeas courts must presume that state courts know and follow the law); *Danforth v. Minnesota*, 552 U.S. at 280 ("States are independent sovereigns with plenary authority").

Nor does this particular case give any ground for suspicion of the state courts. Contrary to Greene's implication, the Pennsylvania Supreme Court's treatment of his appeal was appropriate and unsurprising. The court initially granted Greene's petition for discretionary appeal shortly after this Court's decision in *Gray v. Maryland*. Joint App. 156. After learning, however, that Greene had never raised below the issue actually addressed in *Gray*, Joint App. 183-215, the state supreme court dismissed the appeal as improvidently granted. Joint App. 216. Greene contends that he really did preserve the *Gray* issue, but that is not the point. The point is that the state court had reasonable grounds – just as this Court would – to conclude that Greene's case was not a proper vehicle for discretionary review. That conclusion was hardly evidence of bad faith. Had the court been interested in depriving Greene of his alleged rights, it would simply have denied review from the beginning.

Greene's aspersions on the state courts are all the more ill-fitting in light of the opportunity for collateral review for his claim. The Pennsylvania Supreme Court has held, as a matter of state law, that similarly situated defendants may receive post-conviction review for the application of intervening law that would otherwise be blocked by a previous litigation bar. *Commonwealth v. Cruz*, 851 A.2d 870 (Pa. 2004) (granting collateral relief after co-defendant received benefit of new state constitutional ruling on direct appeal); *see also Commonwealth v. Hargrove*, 254 A.2d 22, 23 n.* (Pa. 1969) (rejecting waiver bar on post-conviction review for claim arising from retroactive federal constitutional ruling); *Commonwealth ex rel. Berkery v. Myers*, 239 A.2d 805, 810 (Pa. 1968) (rejecting final litigation bar for retroactive change in law). The reason Greene did not receive state post-conviction review under *Gray v. Maryland* is not because the Pennsylvania courts are inhospitable; it is because Greene did not even try.

Yet he boldly declares – citing one Alabama rule, one Tennessee case, and no Pennsylvania authority – that the states cannot be trusted to provide collateral review for new rules that arise after the last state court decision, but before final judgment. Brief for Petitioner at 39-40. Some states, after all, might elect to bar review in such situations. And even those that offer the right might snatch it back at any moment.

True enough – that would be their prerogative as independent sovereigns. In their own post-conviction procedures, the states can choose to go beyond AEDPA and enforce new rules that did not exist as of the time of the merits decision on direct appeal – or not. The states can even choose to go beyond *Teague* to apply

new rules that did not exist until after the judgment became final – or not. And even if the states do so extend themselves, the application of the new rules will be unreviewable in federal habeas court, because the new rules were applied in state court by virtue of state law, not federal law. *Danforth v. Minnesota*, 552 U.S. at 288 ("the remedy a state court chooses to provide its citizens for violations of the Federal Constitution is primarily a question of state law").[12]

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[12]The *Teague* exceptions, however, provide a limitation on these principles. If this Court declares a new rule retroactive on collateral review – because it is a watershed rule or because it renders conduct beyond criminal law-making authority – then the claim would be cognizable on state collateral review.

Indeed Pennsylvania, like the federal habeas corpus act, has a specific statutory provision for such cases. Pennsylvania Post-Conviction Relief Act, 42 Pa. Con. Stat. § 9545(b)(iii) ("the right asserted is a constitutional right that was recognized by the Supreme Court of the United States or the Supreme Court of Pennsylvania after the time period provided in this section and has been held by that court to apply retroactively").

A *Teague* exception applied on state collateral review would be the law "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. at 412, and therefore would be subject to federal habeas corpus review under § 2254(d). Under that provision, relief could not be granted unless the state court's adjudication was an unreasonable application of the law. *See Cullen v. Pinholster*, 131 S. Ct. at 1412-13 (Breyer, J., concurring in part).

If the state courts nonetheless barred review, the petitioner would be able to overcome the default and secure federal habeas corpus review through the doctrines of cause and prejudice, actual innocence, or inadequate state grounds. In these circumstances the review would be de novo.

But none of that is reason to abandon the plain meaning of § 2254(d); just the opposite. Greene's rewrite of the provision would provide a powerful incentive *not* to seek state collateral review in cases like his, even where it is clearly available. In Greene's habeas world, the claim based on the new rule becomes complete when the highest state court fails to grant discretionary review. That is, in effect, the merits adjudication. And on federal habeas review, that non-adjudication "adjudication" will be presumptively unreasonable, because the state court will be deemed to have "[chosen] to ignore" the new rule. Brief for Petitioner at 46.

A detour through state post-conviction review at that point would expose the petitioner to a real merits ruling, now subject to real deference in federal court, or even to the possibility of some kind of procedural default ruling. Why risk it? Greene didn't.

B. Finality isn't "fair" either.

Greene asks the Court to impose these costs on comity in the interest of equity. Only the *Teague* rule, he says, with its "final judgment" cutoff, can protect against disparate treatment by state courts at the discretionary review stage.

As it turns out, however, *Teague* has little to do with alleged inequities in state court. The denial of discretionary review by a state supreme court does not constitute final judgment under *Teague*; finality does not occur until this Court completes the discretionary review process, many months later. The possibility of disparate outcomes for similarly situated defendants is no different here than in the state courts.

For example, two litigants, both raising the same legal claim, may both lose their direct appeals on the same day. Both decide to seek review in this Court. One petitioner diligently files his certiorari petition in half the allotted time, on the 45th day. The other petitioner gets a 60-day extension, as does his respondent. The Court denies review in the first case before it even sees the second petition. That petition is granted, a new rule is declared – and only the second petitioner, the dilatory one, receives its benefit. The first is out of luck, because his conviction was already "final." Will he feel better if we tell him about the "twilight zone?"

Thus disparity is inevitable. What Greene calls "arbitrary" is the result of drawing any lines at all. Cases move at different speeds – as events in his own case illustrate. Two of his four co-defendants completed their direct appeals before Greene; their cases reached final judgment before *Gray* was decided. Direct appeals for the other two were delayed; their cases were adjudicated in the Pennsylvania Superior Court after *Gray* was decided.[13]

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[13]The direct appeal of co-defendant Julius Jenkins was decided by the Pennsylvania Superior Court on July 28, 1997. *Commonwealth v. Jenkins*, 701 A.2d 779 (Pa. Super. 1997) (mem.). He did not seek discretionary review in the Pennsylvania Supreme Court within the allotted 30 days, and his conviction became final on August 27, 1997.

The direct appeal of co-defendant Gregory Womack was decided by the superior court on December 16, 1997, together with Greene's. *Commonwealth v. Womack*, 706 A.2d 1261 (Pa. Super. 1997) (mem.). He did not seek allowance of appeal in the state supreme court, and his conviction became final on January 15.

(continued...)

Now Greene says he wants to be treated like the last two rather than the first two. But there is no way to do that. What he is really asking for is the creation of a special category that was not available to any of his co-defendants, or to almost any other state prisoner. His would be a privileged class in which he alone gets federal court merits review under law that was not part of the state court merits review.

That is "fair" to no one but Greene. No matter what line is drawn, some people are going to fall on the other side of it. AEDPA just draws the line at a

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[13](...continued)
1997.

The direct appeal of co-defendant Atil Finney was still in progress when the *Gray* rule was announced, but Finney (one of the two statement-givers) had not raised a redaction claim. The superior court denied relief on June 24, 1999. *Commonwealth v. Finney*, 742 A.2d 203 (Pa. Super. 1999) (mem.).

The direct appeal of co-defendant Naree Abdullah was also still in progress when the *Gray* rule was announced. The superior court applied the new rule but determined that, under all the circumstances, there was no *Gray* error. *Commonwealth v. Abdullah*, 779 A.2d 1213 (Pa. Super. 2001) (mem.). Abdullah subsequently sought federal habeas relief. The district court held that the state court's adjudication of the *Gray* issue was not unreasonable. *Abdullah v. Warden SCI Dallas*, 2010 U.S. Dist. LEXIS 11049 (E.D. Pa. 2010), adopting United States Magistrate Judge's report and recommendation reported at 2007 U.S. Dist. LEXIS 99135 (E.D. Pa. 2007). The case is now on appeal in the Third Circuit, No. 10-1518.

different point – at least for unusual cases like this one – than would pre-AEDPA law.[14]

C. Habeas is not error correction.

At bottom, the appeal of Greene's position is the promise of correcting all the constitutional errors that will suddenly arise as new rules are discovered in the inopportune interlude between merits review and finality of judgment. The question is whether the

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[14]Much as he protests about proper line-drawing, Greene's own has been less than rigorous. Throughout his brief, Greene has chosen to blur the distinction between final judgment and denial of state court review. Compare, for example, the first paragraph in the summary of argument, seeking a cutoff "*before a state supreme court's denial of discretionary review*," with the second paragraph, arguing for a cutoff "*before [the] conviction became final*." Brief for Petitioner at 10 (emphasis supplied).

Similarly, compare the first sentence on page 13, arguing that the ability to seek federal habeas review should not "depend on the happenstance of *whether state supreme courts decide to grant discretionary review*," with the second sentence, arguing that there should be no "*prefinality cutoff*." Brief for Petitioner at 13 (emphasis supplied).

See also, for example, page 38, arguing for a *Teague* finality cutoff on the ground that federal review should not be precluded "*[o]nce the state high court denied review*." Brief for Petitioner at 38 (emphasis supplied).

Not until page 44 of his brief does Greene acknowledge (albeit only indirectly) that the *Teague* finality rule does not actually coincide with the complaint he has been making about state supreme court capriciousness. At that point *Teague* drops out of the case, and Greene is left only with his tortured treatment of the words "adjudication" and "decision" – a word that must now be read to mean "non-decision," else the entire framework falls.

federal habeas corpus statute should be reinterpreted to grant that promise.

In that regard, the Court has been clear about the nature of habeas review. AEDPA is not for "ordinary error correction"; its function is to "guard against extreme malfunctions in the state criminal justice systems." If the bar for relief is therefore set high, "that is because it was meant to be." *Harrington v. Richter*, 131 S. Ct. at 786.

Greene takes quite a different approach to error correction. Indeed he suggests that this Court has a constitutional obligation to ensure application, to all cases pending on direct appeal, of new rules that are announced before the end of the certiorari stage. He proposes a corresponding obligation to appoint counsel to prepare certiorari petitions to ensure that such cases are brought to the Court's attention. Brief for Petitioner at 40-43.

The way to relieve this Court of this onerous obligation to do error correction, Greene contends, is to draft the 50 state supreme courts to do error correction. That way their "decisions" (*i.e.*, grants and denials of discretionary review) can be reviewed by the lower federal habeas courts, so that *they* can do error correction.

This is a lot of error correction. But it is not the way the habeas process works in a federal system. There is always a theoretical possibility that some deserving claim will fall through the cracks if Greene's view does not prevail here. But it is a slim possibility requiring a whole series of ifs: if a defendant properly preserves his objection in state court; if a new rule

validating that objection comes down at just the wrong time; if the state supreme court denies discretionary review; if the state's collateral review structure bars further appeal; if rejection of the claim would have been an unreasonable application of the law to the specific facts of the case; if the violation had substantial and injurious effect. If all of these things happen, a prisoner in Greene's shoes will not get federal habeas relief that he would otherwise have received.

But that would be only one of the many theoretical ways, and a relatively rare one, in which AEDPA allows for uncorrected "errors." Even in the usual case, in which there is no intervening new rule, only an unreasonable application of the law results in relief; garden-variety "incorrect" state court rulings will stand. Even more limiting is AEDPA's definition of "the law" as the precedents of this Court. If the state court ruling is directly contrary to unanimous circuit precedent, but not to this Court's precedent, the state court's "erroneous" ruling will survive. Such "errors" do not offend AEDPA. On the contrary – the deference rule that shields these state court decisions "is part of the basic structure of federal habeas jurisdiction." *Harrington v. Richter*, 131 S. Ct. at 787.

Greene would supplant that structure. He would give federal judges ex post facto authority to reverse state judges for making "errors" that were not errors when they were "made." Under AEDPA, however, the lower federal habeas courts cannot fly in like the hindsight police to save the day after the fact. If a state court adjudicating the merits of a claim could not possibly have known it was violating a rule of law – because the rule did not even exist – then the

adjudication was not an "unreasonable application of clearly established law." On this point, the words of the statute are plain enough.

Conclusion

For these reasons, respondents respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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REPLY BRIEF

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BRIEFS

No. 10-637

IN THE

Supreme Court of the United States

ERIC GREENE,

Petitioner,

v.

JON FISHER,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONER 1

I. Section 2254(d) Does Not Alter *Teague*'s Rule That Habeas Petitioners Are Entitled To the Benefit Of New Rules Announced Before Their Convictions Become Final 2

A. Statutory Interpretation Principles Indicate That Section 2254(d) Does Not Alter *Teague*'s Finality Cutoff 4

B. The Purpose of Section 2254(d) Does Not Require Any Alteration To *Teague*'s Finality Cutoff 9

C. This Court's Prior Cases Do Not Require Setting The Cutoff At The Last State-Court Decision On The Merits 11

D. Practical And Constitutional Considerations Reinforce The Wisdom Of Retaining *Teague*'s Finality Cutoff 13

II. Even If Section 2254(d) Alters *Teague*'s Finality Cutoff, A Decision From This Court That Predates A State High Court's Disposal Of The Case Should Qualify As "Clearly Established Law" 15

A. Such A Rule Would Comport With the Text of Section 2254(d) 16

B. Such A Rule Would Comport With AEDPA's Purpose 17

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

ACLU v. McCreary County, 607 F.3d 439 (6th Cir. 2010) 7

Alden v. Maine, 527 U.S. 706 (1999) 12

Brecht v. Abrahamson, 507 U.S. 619 (1993) 15

Brown v. Allen, 344 U.S. 443 (1953) 14

Carey v. Musladin, 549 U.S. 70 (2006) 6

Caspari v. Bohlen, 510 U.S. 383 (1994) 3

Chisom v. Roemer, 501 U.S. 380 (1991) 3

Coleman v. Thompson, 501 U.S. 722 (1991) 19

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) 12

Early v. Packer, 537 U.S. 3 (2002) (per curiam) 7, 8, 13

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 8

Gray v. Maryland, 523 U.S. 185 (1998) 2

Griffith v. Kentucky, 479 U.S. 314 (1987) .. 14, 15, 18

Harrington v. Richter, 131 S. Ct. 770 (2011) ...passim

Harris v. Reed, 489 U.S. 255 (1989) 19

Horn v. Banks, 536 U.S. 266 (2002) (per curiam) 1, 2, 8, 9

Igartua v. United States, 626 F.3d 592 (1st Cir. 2010) 7

Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325 (2011) 8

King v. St. Vincent's Hosp., 502 U.S. 215 (1991) 8

Moskal v. United States, 498 U.S. 103 (1990) 4

Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005) 7

Powell v. Nevada, 511 U.S. 79 (1994) 18

Russello v. United States, 464 U.S. 16 (1983) 17

Smith v. Spisak, 130 S. Ct. 676 (2010) 12

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409 (1986) 3

Strickland v. Washington, 466 U.S. 668 (1984) 5, 12

Teague v. Lane, 489 U.S. 288 (1989) ..... passim

Thaler v. Haynes, 130 S. Ct. 1171 (2010) 6

Williams v. Taylor, 529 U.S. 362 (2000) 6

Wright v. West, 505 U.S. 277 (1992) 6, 10, 11

Ylst v. Nunnemaker, 501 U.S. 797 (1991) 19

Federal Statutes

28 U.S.C. § 2254(a) 5

28 U.S.C. § 2254(d) ..... passim

REPLY BRIEF FOR PETITIONER

Federal habeas law in general, and retroactivity law in particular, must balance two competing interests: criminal defendants' interest in trials that comport with constitutional guarantees, and states' interest in repose. After two decades of internal deliberation on this vexing subject, this Court – in *Teague v. Lane*, 489 U.S. 288 (1989) – settled on the date of finality as the retroactivity cutoff that best accommodated these competing objectives. And for the two decades since, this Court and lower courts have implemented that rule with no complaint (indeed, with active support) from the states. Yet the Commonwealth now says that AEDPA, in the midst of establishing a system of substantive deference to state courts' resolutions of constitutional claims, also implicitly "hit the reset button" on this Court's retroactivity jurisprudence. Resp. Br. 9.

The Commonwealth fails to muster the kind of affirmative evidence necessary to support such a contention. To the contrary, the text, structure, and legislative history of 28 U.S.C. § 2254 indicate that Congress intended to retain *Teague*'s finality cutoff in habeas cases and to avoid unleashing the practical and theoretical problems that adopting a new retroactivity rule would generate. Lest there be any doubt, this Court has already once considered the argument that "*Teague* has been replaced by § 2254(d)'s 'clearly established' language." Pet. for Cert. 10-11, *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *available at* 2002 WL 32135087. This Court summarily rejected it. *Horn v. Banks*, 536 U.S. at 272. Yet the Commonwealth does not even cite *Horn*,

much less offer any compelling reason for reversing course here.

At any rate, even if Section 2254(d) does somehow displace *Teague* when it would move the retroactivity cutoff back (but not, under *Horn* when it would move it forward), it would still not alter the proper outcome here. Contrary to the Commonwealth's arguments, the most that Section 2254(d) could reasonably be read to do would be to forbid relief based on a decision from this Court that postdates the state high court's disposal of the case on direct review. The case upon which petitioner relies, however – *Gray v. Maryland*, 523 U.S. 185 (1998) – *predates* such a cutoff.

I. Section 2254(d) Does Not Alter *Teague*'s Rule That Habeas Petitioners Are Entitled To The Benefit Of New Rules Announced Before Their Convictions Became Final.

The Commonwealth does not dispute that a party arguing that a statutory amendment changed the law must overcome a presumption of continuity – that is, the party must show a "clear" or "specific" congressional intent to change the law. *See* Petr. Br. 16-17 (citing cases). At the same time, the Commonwealth asserts that "[n]o special dispensation from Congress is required" here because Section 2254(d) did not alter *Teague*, but rather merely added another retroactivity rule to the federal habeas statute. Resp. Br. 17. To the extent this assertion is meant to challenge the applicability of the presumption-of-continuity canon here, the challenge is baseless.

Prior to AEDPA, *Teague*'s construction of the federal habeas statute gave habeas petitioners the benefit of any decision that this Court announced before their convictions became final. *See, e.g.*, *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). The Commonwealth contends that this is no longer the law; so long, the Commonwealth maintains, as the state courts rejected a prisoner's claim on the merits, the retroactivity cutoff is no longer finality but rather the date of the last state-court decision on the merits. Put more concretely, the Commonwealth argues that prisoners such as petitioner are no longer entitled to the benefit of decisions upon which they could have sought habeas relief prior to AEDPA. No matter how that argument is packaged or grounded in the new statute, it obviously amounts to an argument that Congress changed the law. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 396 (1991) (applying presumption-of-continuity canon to reject an argument that statutory language in a new subsection implicitly trumped prior interpretation of another subsection that remained on the books); *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 420 (1986) (same). Accordingly, the presumption-of-continuity canon applies here.

Applying that canon, none of the Commonwealth's statutory-interpretation arguments shows a clear or specific intent in Section 2254(d) to alter the rule that habeas petitioners are entitled to the benefit of decisions announced before their convictions became final. Nor do any of the Commonwealth's arguments based on Section 2254(d)'s purpose, this Court's precedent, or practical consequences give this Court reason to change the law.

A. Statutory Interpretation Principles Indicate That Section 2254(d) Does Not Alter *Teague*'s Finality Cutoff.

The Commonwealth does not dispute that no clear intent (indeed, no whisper of any intent at all) to alter habeas retroactivity law can be found in AEDPA's extensive legislative history or its structure. *See* Petr. Br. 25-29. But the Commonwealth argues that a clear indication to do so appears in the text of new Section 2254(d). Specifically, the Commonwealth contends that the statute's words "clearly established" and "unreasonable application" prohibit a "contra-factual" inquiry that asks whether a state-court judgment is compatible with a decision from this Court that did not "exist[] at the time of the state adjudication." Resp. Br. 19, 22-23. Accordingly, the Commonwealth argues that the plain language of Section 2254(d) draws a temporal cutoff at the last state-court decision on the merits. There are three problems with this argument, each of which shows that Section 2254(d) does not contain any retroactivity principle.

1. The Commonwealth's argument violates "the established principle that a court should give effect, if possible, to every clause and word of a statute." *Moskal v. United States*, 498 U.S. 103, 109 (1990) (internal quotation marks and citations omitted). Section 2254(d) forbids granting habeas relief unless the state court's "adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." Yet the Commonwealth fails to assign any meaning to the clause "resulted in a decision that." *See* Petr. Br. 23-24 (discussing this clause). If

the Commonwealth were correct that the relevant inquiry under Section 2254(d) is whether the reasoning in the last state-court opinion on the merits contravened then-existing law, the statute would simply ask whether the "adjudication of the claim was contrary to, or involved an unreasonable application of, clearly established Federal law."

There is a good reason why the actual statute does not read that way. A federal habeas court's job is not to grade the state court's paper, but rather to determine whether the state courts had a reasonable basis "to deny relief." *Harrington v. Richter*, 131 S. Ct. 770, 784 (2011); *see also* 28 U.S.C. § 2254(a) (federal habeas court's job is to inquire into the legitimacy of the state court's "judgment"). Accordingly, the clause "resulted in a decision that" makes clear that the statute's focus is not on the state court's adjudication itself, but is limited to the result or outcome in the state courts. Petr. Br. 23.[1]

To be sure, Section 2254(d)'s use of the "past tense" in phrases such as "clearly established" dictates, as the Commonwealth points out (Resp. Br. 22, 28), that this is a backward-looking inquiry. But that actuality, in and of itself, does not require any particular retroactivity cutoff. Federal habeas review

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[1] The Commonwealth's analogy (Resp. Br. 19-20, 34) to the reasonableness standard in the "performance prong" of the test in *Strickland v. Washington*, 466 U.S. 668 (1984), for ineffective assistance of counsel fails for the same reason. That prong focuses merely on the quality of the work of an actor (a lawyer) in a trial. Section 2254(d), however, focuses not on the work of an actor (the state court), but rather on the ultimate result.

of a state-court judgment is, by definition, backward-looking. Indeed, Justice Kennedy has explained that *Teague*'s "purpose is to determine whether application of a new rule would upset a conviction that was obtained in accordance with the constitutional interpretations *existing at the time of the prisoner's conviction*." *Wright v. West*, 505 U.S. 277, 307 (1992) (opinion concurring in the judgment) (emphasis added). There is no need to create a new retroactivity rule, therefore, to accommodate the verb tense in which Section 2254(d) is written.

Nor, contrary to the Commonwealth's contention (Resp. Br. 22-23), is creating a new retroactivity rule necessary to give "meaning[]" to the phrase "clearly established." As Justice O'Connor explained in her opinion for the Court in *Williams v. Taylor*, 529 U.S. 362 (2000), that phrase prohibits federal courts from giving habeas relief based on dicta or other explanatory language in this Court's case law that falls short of being part of a holding. *Id.* at 412; *see also Thaler v. Haynes*, 130 S. Ct. 1171, 1174-75 (2010); *Carey v. Musladin* 549 U.S. 70, 79 (2006) (Stevens, J., dissenting) (noting that Section 2254(d) prohibits relief based on "explanatory language" in this Court's opinions "that is intended to provide guidance to lawyers and judges in future cases"); Petr. Br. 21, 23. While the Commonwealth asserts that Section 2254(d)'s textual requirement that the state-court decision be contrary to "law" accomplishes that goal on its own (Resp. Br. 22), the word "law" alone is not that powerful. Courts of appeals typically deem explanatory language part of the "law"

that emerges from an opinion from this Court, even when it technically is dictum.[2] Only the addition of the words "clearly established" forbids that default practice.

2. The Commonwealth's argument ignores this Court's decision in *Early v. Packer*, 537 U.S. 3 (2002) (per curiam), in which this Court sanctioned – indeed, required – the very type of "contra-factual" inquiry that the Commonwealth asserts that Section 2254(d)'s language precludes. In *Packer*, a federal court had granted habeas relief because the last state-court decision on the merits "failed to cite . . . the controlling Supreme Court precedents." *Id.* at 8 (quoting lower court decision). This Court reversed, explaining that it is irrelevant under Section 2254(d) whether a state court was even "aware[]" of relevant federal cases. *Id.* All that matters is whether "the result of the state-court decision contradicts them." *Id.*; *accord Richter*, 131 S. Ct. at 784. This, again, is because the point of Section 2254(d) is not to "tar[]"

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[2] *See, e.g., Igartua v. United States*, 626 F.3d 592, 605 n.15 (1st Cir. 2010) ("Carefully considered Supreme Court dicta, though not binding, must be accorded great weight and should be treated as authoritative," because "[a]lthough the Supreme Court may ignore its own dicta, we are a lower court bound by the Supreme Court") (internal quotation marks and citation omitted); *ACLU v. McCreary County*, 607 F.3d 439, 448 (6th Cir. 2010) ("Lower courts are obligated to follow Supreme Court dicta, particularly where there is not substantial reason for disregarding it, such as age or subsequent statements undermining its rationale.") (internal quotation marks and citation omitted); *Oyebanji v. Gonzales*, 418 F.3d 260, 264-65 (3d Cir. 2005) ("[A]s a lower federal court, we are advised to follow the Supreme Court's considered dicta.").

state judges (Resp. Br. 18) for issuing careless opinions, much less for sometimes exhibiting a lack of foresight. The point is to allow prisoners to obtain fair trials when initial proceedings in state courts clearly contravened constitutional principles announced before the case became final.

3. The Commonwealth's argument contravenes the "cardinal rule" that "the meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Indeed, even when words "in isolation" give rise to a potential reading of a statute, this Court rejects that reading when it conflicts with the structure of the statute. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325, 1330-31 (2011); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole.") (internal quotation marks and citations omitted). As petitioner's opening brief explained, two structural aspects of the federal habeas statute – (1) its continued reliance on *Teague*'s regime for determining the retroactivity of "new rules," and (2) its use of finality as a trigger for its limitations period – show that Congress assumed in enacting AEDPA that *Teague*'s finality cutoff would continue to control situations like this one. Petr. Br. 25-27. Neither the Commonwealth nor its amici even attempt to refute this reality.

Nor does the Commonwealth attempt to square its argument with this Court's decision in *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam). In that case, this Court held that state prisoners seeking

federal habeas relief are still not entitled to the benefit of "new rules" under *Teague*, even when this Court announced the rule before the last state-court decision on the merits (a denial of post-conviction relief) and the state court applied the rule. In other words, *Horn* squarely rejected the argument that "*Teague* has been replaced by § 2254(d)'s 'clearly established' language." Pet. for Cert. 10-11, *Horn v. Banks*, 536 U.S. 266 (2002) (per curiam), *available at* 2002 WL 32135087; *see also* Petr. Br. 24-25. If Section 2254(d) does not displace *Teague* when such a displacement would help a state prisoner, there is no principled reason why it somehow displaces *Teague* when it would hurt a prisoner. The words "clearly established" – both as a matter of text and structure – must operate consistently in both situations.

B. The Purpose Of Section 2254(d) Does Not Require Any Alteration To *Teague*'s Finality Cutoff.

The Commonwealth also contends that *Teague*'s finality cutoff is inconsistent with this Court's recent observation that Section 2254(d) is designed to operate as a "relitigation bar," or a "modified form of res judicata." Resp. Br. 9, 15 (quoting *Richter*, 131 S. Ct. at 785-86). Given that statutory purpose, the Commonwealth maintains that the statute must "necessarily" be construed as including a new and additional retroactivity rule on top of *Teague*'s regime – a rule that moves the "temporal cutoff" back to the last state-court decision on the merits. Resp. Br. 15-16. This argument does not make sense.

It does not matter whether Section 2254(d) is labeled a res judicata rule, a standard of review, or

something else. The key fact, as the Commonwealth itself repeatedly emphasizes, is that it is a "deference provision." Resp. Br. 9, 15; *see also id.* at 17 (calling Section 2254(d) a "deference rule"). And the concept of "deference" is different than "retroactivity." *West*, 505 U.S. at 307-08 (Kennedy, J., concurring in the judgment); *see also id.* at 305 (O'Connor, J., concurring in the judgment) ("As Justice Kennedy convincingly demonstrates," the *Teague* doctrine "is not the same as deference."). A deference provision dictates that when "the question is close" the state-court decision should not be upset. *Id.* at 308 (Kennedy, J., concurring in the judgment); *see also Richter*, 131 S. Ct. at 786 (purpose of Section 2254(d) is to bar relief when "fairminded jurists could disagree on the correctness of the state court's decision") (internal quotation marks and citation omitted). By contrast, a retroactivity rule simply decides the "threshold" question of what law applies to one court's review of another's decision. *Teague*, 489 U.S. at 300.

What is more, a deference provision does not necessarily need to include any particular retroactivity regime. A rule of deference could be paired with a finality cutoff just as easily as it could be coupled with a cutoff pegged to the last state-court decision on the merits. So AEDPA's addition of a deference provision to the federal habeas statute does not dictate that any particular retroactivity regime must now exist.

That leaves the analysis where it started, still posing the question whether anything *specific* about Section 2254(d)'s purpose requires this Court to abandon *Teague*'s retroactivity cutoff in cases in

which state courts rejected the claim at issue on the merits. The Commonwealth's only real attempt to address that question is its assertion that "[a]n indispensible element of [Section 2254(d)'s] deference was to prevent the use of habeas review to blindside state court judges with evidence and rules that were not before them at the time." Resp. Br. 10. But this contention is unavailing. Before AEDPA, *Teague*'s finality cutoff was already serving that "comity interest" by "not subjecting the States to a regime in which finality is undermined by [this Court's] changing a rule once thought correct but now understood to be deficient on its own terms." *West*, 505 U.S. at 308 (Kennedy, J., concurring in the judgment).

At bottom, therefore, the Commonwealth's true contention is not that Section 2254(d) created a new state interest that must be accommodated here. Rather, the Commonwealth is complaining that in a "twilight zone" situation such as this, *Teague*'s finality cutoff does not sufficiently serve its pre-AEDPA interest in repose. That complaint has nothing to do with Section 2254(d). The Commonwealth might like this Court to reconstruct the retroactivity regime that this Court has carefully crafted in *Teague* and its progeny, but Section 2254(d) does not give this Court license – indeed, any good reason at all – to do so.

C. This Court's Prior Cases Do Not Require Setting The Cutoff At The Last State-Court Decision On The Merits.

Last year, in *Smith v. Spisak*, 130 S. Ct. 676, 681 (2010), this Court expressly characterized the

question presented here as an open one and assumed that the position petitioner advocates here is correct. The Commonwealth nonetheless argues that pre-*Spisak* case law settles the issue and would have to be "overrule[d]" to hold that *Teague*'s finality cutoff controls the temporal universe of "clearly established" law under Section 2254(d). Resp. Br. 27-35. Petitioner has already explained why that is not so. *See* Petr. Br. 31-34. Suffice it to say here, therefore, that this Court does not treat as binding precedent "isolated statements" in prior cases that "did not squarely address, much less resolve" an issue, *Alden v. Maine*, 527 U.S. 706, 735-37 (1999) – especially when, as here, other isolated statements in other cases point in the opposite direction.

Nothing in this Court's post-*Spisak* decision in *Cullen v. Pinholster*, 131 S. Ct. 1388 (2011), resolves the question presented either. The state prisoner in that case – as in the pre-*Spisak* cases just referenced above – sought the benefit of a decision, *Strickland v. Washington*, 466 U.S. 668 (1984), announced long before his trial took place. So the question presented here did not arise in *Pinholster* either.

The Commonwealth insists, however, that in light of *Pinholster*'s holding that Section 2254(d) limits the applicable facts to those that were known at the time of the relevant state-court decision, the statute must also "limit[] the applicable law in the same way." Resp. Br. 29. But facts and law need not become locked in at the same time. To the contrary, facts frequently become locked in before the law does. Appellate courts, for example, prohibit reliance on new evidence but routinely apply intervening legal authority to trial-court or administrative rulings.

Federal courts can do the same thing in the federal habeas context, provided the intervening decision was announced before the prisoner's conviction became final.

D. Practical And Constitutional Considerations Reinforce The Wisdom Of Retaining *Teague*'s Finality Cutoff.

The Commonwealth argues that leaving *Teague*'s finality cutoff in place in the context of Section 2254(d) "would provide a powerful incentive" for state prisoners "*not* to seek state collateral review" because a state-court decision that predates a relevant new case from this Court "will be presumptively unreasonable." Resp. Br. 39. The Commonwealth is incorrect. Even when a state-court opinion fails to apply a relevant decision from this Court, "the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." *Richter*, 131 S. Ct. at 784; *accord Packer*, 537 U.S. at 8. So a state prisoner has nothing to gain – and, indeed, much potentially to lose – under *Teague*'s retroactivity cutoff by foregoing an opportunity to seek state collateral review based on a "twilight zone" decision from this Court.[3]

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[3] Contrary to the impression that the Commonwealth's brief might give, Resp. Br. 39, petitioner himself sought state collateral relief. He did not, however, press his Confrontation Clause claim because he lacked the assistance of counsel and likely believed (probably correctly) that it would have been barred on the ground that he had already pressed it and lost on direct review. *See* Petr. Br. 39-40; Pet. App. 63a n.13 (Ambro, J., dissenting).

By contrast, the Commonwealth's proposed rule would have a dramatic effect on current practices, unleashing an array of equitable and constitutional problems. For starters, the Commonwealth acknowledges that its proposed rule would cause petitioner and others with "deserving claim[s]" – that is, with claims that are clearly meritorious, were properly preserved, and were vindicated in a constitutionally timely manner under *Griffith v. Kentucky*, 479 U.S. 314 (1987) – to "fall through the cracks." Resp. Br. 43. The Commonwealth tries to justify this jarring concession by asserting that federal habeas review "is not for 'ordinary error correction'; its function is to 'guard against extreme malfunctions in the state criminal justice systems.'" *Id.* (quoting *Richter*, 131 S. Ct. at 786). But the Commonwealth misunderstands the quotations it crops from *Richter*. For over fifty years, state prisoners have been entitled to federal habeas relief when they show that their trial violated any constitutional right (save the Fourth Amendment's exclusionary rule), *see Brown v. Allen*, 344 U.S. 443, 482-87 (1953), and that the violation had a substantial and injurious effect on the outcome, *see Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). AEDPA does not change that. *Richter* simply emphasized that new Section 2254(d) requires such a constitutional violation to be more plainly apparent than it needed to be before. The Commonwealth does not dispute that petitioner (and others like him) can satisfy that requirement.

Nor, on a more fundamental level, does the Commonwealth dispute that its rule would create a serious disjoint between habeas law and the retroactivity rule that governs direct review

(*Griffith*). *See* Petr. Br. 37-40. The Commonwealth suggests that state habeas review could mitigate this problem. Resp. Br. 37. But, as the Commonwealth is also forced to acknowledge, states need not – and some do not – provide such an avenue of relief. *Id.*; Petr. Br. 39-40. Indeed, Pennsylvania law itself is fuzzy on the issue. *Compare* Pet. App. 34a & n.12, *with* Pet. App. 63a n.13 (Ambro, J., dissenting). And the Commonwealth's amici conspicuously refrain from endorsing the prospect of seeking such relief in any of their own state courts.

Instead, the amici suggest that this Court's GVR practice could mitigate the disjoint between their proposed habeas retroactivity cutoff and the direct-review cutoff established by *Griffith*. Br. of Texas et al. 21. But the amici provide no answer whatsoever to the serious practical and constitutional problems (including the need to guarantee counsel at the certiorari stage) that petitioner has explained would follow from such a state of affairs. Petr. Br. 40-43. Once again, this silence is telling.

In short, the Commonwealth and its amici are asking this Court to abandon decades of painstakingly designed retroactivity law without any workable plan for implementing their proposed new regime. This Court should turn away that request.

II. Even If Section 2254(d) Alters *Teague*'s Finality Cutoff, A Decision From This Court That Predates A State High Court's Disposal Of The Case Should Qualify As "Clearly Established Law."

The Commonwealth has very little to say about petitioner's alternative argument – namely, that even

if Section 2254(d) does somehow contain a new retroactivity rule that is keyed to when the state courts last decided the prisoner's claim, that rule should be satisfied here. Instead, the Commonwealth primarily acts as though petitioner's alternative argument is part of his main argument that Section 2254(d) does not change retroactivity law at all and, thus, that it somehow undermines that main argument. Resp. Br. 23-26, 42 n.14. To be clear: petitioner argues that the cutoff for clearly established law is the state high court's disposal of the case *only insofar as this Court disagrees with his primary argument that Section 2254(d) does not contain any retroactivity rule at all.*

The Commonwealth's statutory and practical responses to *that* argument in the alternative are unpersuasive.

A. Such A Rule Would Comport With The Text Of Section 2254(d).

Neither of the Commonwealth's textual attacks on a retroactivity cutoff pegged to the state high court's disposal of the case withstands scrutiny.

First, the Commonwealth asserts that petitioner's argument improperly assumes that a state high court's denial of discretionary review is a ruling "on the merits." Resp. Br. 23. But petitioner does not make this assumption at all. To the contrary, petitioner's alternative rule assumes that *the state intermediate court's ruling* rejecting a claim in a case such as this is an "adjudication on the merits." Petr. Br. 48-49. The state high court's denial of review is a "decision" that can be contrary to

clearly established federal law existing at that time. *Id.*

Second, the Commonwealth argues that the words "adjudication" and "decision" cannot apply to two different points in the direct review process. Resp. Br. 26. Instead, the Commonwealth contends, those two words must refer to the legal "process" and the "result" of a single proceeding in a single state court. *Id.* There is no good reason, however, why that must be the case. The phrase "adjudication on the merits" could refer to the proceedings in one court, while the term "decision" could refer to the outcome in another. Indeed, given that this Court ordinarily "refrain[s] from concluding" that "differing language" in two places in a statute "has the same meaning in each," *Russello v. United States*, 464 U.S. 16, 23 (1983), such a construction makes more sense than the Commonwealth's suggestion that the words should be viewed "interchangeably," Resp. Br. 26.[4]

B. Such A Rule Would Comport With AEDPA's Purpose.

The Commonwealth argues that counting a decision announced before a state high court denied discretionary review as "clearly established law" would intrude on state supreme courts' "unreviewable power simply to step aside and leave the resolution below as the last decision in the case."

---

[4] Respondent's amici contend additionally that petitioner's alternative argument disregards Section 2254(d)'s use of the "past tense." Br. of Texas et al. 9. As noted above, however, Section 2254(d) remains backward-looking no matter where the retroactivity cutoff is placed. *See supra* at 5-6.

Resp. Br. 24. To the extent that the Commonwealth suggests that state high courts should have the all-purpose ability to lock in applicable law as of the time of the state intermediate court decision, they lack that power under *Griffith*, and will continue to lack it no matter what happens in this case. *See Powell v. Nevada*, 511 U.S. 79, 83-84 (1994). To the extent that the Commonwealth means merely to suggest that when a state high court denies discretionary review, it should not be saddled with the presumption that it had a "fair opportunity" to pass on the prisoner's claim, this suggestion lacks force. Such a circumstance obviously affords a fair opportunity to pass on the claim, and that is all any amendment AEDPA made to retroactivity law could plausibly require.

To be sure, if a procedural defect legitimately causes a state high court to deny review, it is perfectly free to say so, and federal courts will honor that invocation by deeming the claim procedurally defaulted. *See Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *Harris v. Reed*, 489 U.S. 255, 264-65 (1989). Even if a state high court does not express any reason for denying review, this Court held long ago that a federal court on habeas review may find a claim procedurally defaulted when the state intermediate court rejected the prisoner's claim on the merits but a procedural glitch became apparent in briefing to the state high court. *See Ylst*, 501 U.S. at 804-05; *Coleman v. Thompson*, 501 U.S. 722, 740 (1991).

But despite various loose rhetoric in its statement of the case, the Commonwealth never attempts to make such a showing here. Nor could it.

As the Third Circuit held, Pet. App. 15a, and as elaborated in petitioner's opening brief at 4-6, petitioner fairly presented his Confrontation Clause claim to the Pennsylvania Superior Court, and that court rejected it on the merits. Nothing in the Pennsylvania Supreme Court's order dismissing petitioner's appeal suggests otherwise. J.A. 216. Under these circumstances, neither AEDPA nor any other tenet of federalism is transgressed when a federal court reaches the merits of a prisoner's claim and applies all of this Court's decisions that existed at least when the state high court elected not to address his claim.

In sum, the purpose of federal habeas review is not – as the Commonwealth seems to think – to upbraid insolent state courts. Rather, it is to allow defendants to obtain fair trials in the rare situations in which they objected to procedures that not only were unconstitutional, but whose unconstitutionality was apparent while the case was still in the state-court system. When these circumstances are present, and a state court declined to remedy the situation despite having had a fair opportunity to do so, nothing more should be required for a federal court to grant relief.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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No. 10-637

IN THE SUPREME COURT OF
THE UNITED STATES

ERIC GREENE,
Petitioner,
v.
JON FISHER,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. iv

INTEREST OF AMICI CURIAE. 1

SUMMARY OF ARGUMENT. 3

ARGUMENT. 5

THE THIRD CIRCUIT'S PRE-FINALITY CUTOFF DATE FOR THE ANNOUNCEMENT OF "CLEARLY ESTABLISHED FEDERAL LAW" WOULD BLUR THE BRIGHT-LINE RETROACTIVITY RULE OF GRIFFITH AND TEAGUE, CONTRADICT OTHER STATUTORY PROVISIONS AND OTHER PRECEDENTS OF THIS COURT, AND CREATE PRACTICAL PROBLEMS FOR LITIGATING HABEAS CASES. 5

A. Introduction. 5

B. The Griffith-Teague Rule and § 2254(d) Perform Independent Functions. 7

C. **Setting A Cutoff Date For "Clearly Established Federal Law" At The Time Of The Last State Court Decision Would Collide With Other Rules Governing The Availability of Habeas Relief.** 14

1. The Third Circuit's Construction Would Take Away Habeas Review That Would Otherwise Be Available Under Teague or The Statute Of Limitations. 14

2. The Early Cutoff Rule For "Clearly Established Federal Law," If Carried To Its Logical Conclusion, Would Require De Novo Review Of A Claim Based On A New Rule Announced After The Last State Court Decision. 20

D. A Pre-Finality Cutoff Date For "Clearly Established Federal Law" Would Create Other Practical Problems For Litigating And Deciding Cases on Direct and Collateral Review. 22

1. The Early Cutoff Date Would Deny Habeas Review To Petitioners In States That, Following Danforth v. Minnesota, Provide A Post-Conviction Forum For New Federal Constitutional Rules Enunciated After Finality. 22

2. The Third Circuit's Rule Would Place An Unfair Burden On Indigent Petitioners, Who Are Generally Unrepresented During All Or Part Of The Time Between The Last State Court Decision On The Merits And The Date The Conviction Becomes Final. 27

3. The Early Cutoff Rule Would Burden The Discretionary Dockets Of This Court And State Courts Of Last Resort. . . 31

CONCLUSION. 33

TABLE OF AUTHORITIES

FEDERAL CASES

Anders v. California, 386 U.S. 738 (2009) 25

Atkins v. Virginia, 536 U.S. 304 (2002)..... 17

Beard v. Banks, 542 U.S. 406 (2004)..... 25, 26

Bell v. Cockrell, 310 F.3d 330 (5th Cir. 2002)..... 17

Carey v. Musladin, 549 U.S. 70 (2006) 12

Carey v. Saffold, 536 U.S. 214 (2002)..... 25

Caspari v. Bohlen, 510 U.S. 383 (1994)..... 12

Crawford v. Washington, 541 U.S. 36 (2004) 23

Cullen v. Pinholster, 131 S. Ct. 1388 (2011) 16, 21

Danforth v. Minnesota, 552 U.S. 264 (2008) ..... passim

Duncan v. Walker, 533 U.S. 167 (2001) 14

Early v. Packer, 537 U.S. 3 (2002) 16

Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003) . 19

Gideon v. Wainwright, 372 U.S. 335 (1963)..... 17

Gonzalez v. Crosby, 545 U.S. 524 (2005). 21

Gray v. Maryland, 523 U.S. 185 (1998) .. . . . . passim

Greene v. Palakovich, 606 F.3d 85 (3d Cir. 2010). . . . . passim

Griffith v. Kentucky, 479 U.S. 314 (1987). . . passim

Harrington v. Richter, 131 S. Ct. 770 (2011) 16

Horn v. Banks, 536 U.S. 266 (2002). 11

Jimenez v.Quarterman, 129 S. Ct. 681 (2009).. . . 25

Lockyer v. Andrade, 538 U.S. 63 (2003).. 13

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816). 27

Mayle v. Felix, 545 U.S. 644 (2005) 14, 21

Mills v. Maryland, 486 U.S. 367 (1988). . . . . passim

O'Sullivan v. Boerckel, 526 U.S. 838 (1999). 25

Padilla v. Kentucky, 129 S. Ct. 1317 (2009). 30

Porter v. McCollum, 130 S. Ct. 447 (2009) 20

Rhines v. Weber, 544 U.S. 269 (2005) 14, 24

Richardson v. Marsh, 481 U.S. 200 (1987) 21

Rompilla v. Beard, 545 U.S. 374 (2005) 20

Smith v. Spisak, 130 S. Ct. 676 (2010) 13

Strickland v. Washington, 466 U.S. 664 (1984) . . . 10

Teague v. Lane, 489 U.S. 288 (1989) . . . . . passim

Thaler v. Haynes, 130 S. Ct. 1171 (2010) 12

Thompson v. Runnels, ___ F.3d ___, 2011 WL 2279451 (9th Cir. June 9, 2011) 16

Whorton v. Bockting, 549 U.S. 406 (2007). 12, 17, 23

Wiggins v. Smith, 539 U.S. 510 (2003) 12, 20

Williams v. Taylor, 529 U.S. 362 (2000) . . . . . passim

Woodford v. Viscotti, 537 U.S. 19 (2002). 16

Yarborough v. Alvarado, 541 U.S. 652 (2004). . . . 12

STATE CASES

Birdsong v. State, 929 So. 2d 1027 (Ala. Crim. App. 2005) 29

Commonwealth v. Liebel, 825 A.2d 630 (Pa. 2003) 28

Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. 2008). 30

Commonwealth v. Smith, 818 A.2d 494 (Pa. 2003). 30

Douglas v. State, 631 S.E.2d 542 (S.C. 2006). . . . 29

Ex parte Riley, 193 S.W.3d 900 (Tex. Crim. App. 2006). 29

Hathaway v. State, 741 N.W.2d 875 (Minn. 2007) 29

Kargus v. State, 169 F.3d 307 (Kan. 2007). 28

Moore v. Commonwealth, 199 S.W.3d 132 (Ky. 2006). 29

People v. Love, 727 N.E.2d 680 (Ill. App. 2d Dist. 2000) 29

Small v. State, 920 A.2d 1024 (Conn. App. 2007) 29

State ex rel. Schmelzer v. Murphy, 548 N.W.2d 45 (Wis. 1996) 28

State v. Carter, 757 N.E.2d 362 (Ohio 2001). 29

State v. Mata, 730 N.W.2d 396 (Neb. 2007). 29

State v. Preciose, 609 A.2d 1280 (N.J. 1992). 26

FEDERAL STATUTES

18 U.S.C. § 3006A. 2

28 U.S.C. § 2244(d). 4, 18

28 U.S.C. § 2254 . . . . . 1, 2

28 U.S.C. § 2254(d). . . . . passim

28 U.S.C. § 2255. 2

STATE STATUTES

16A Ariz. Stat. Ann., Crim. Pro. R. 32.4 (c)(2).. . . 30

42 Pa. C.S.A. § 2545(b)(1), (3) 29

N.J. Ct. R. 2:7-2(a) 28

Pa. R. Crim. P. 122 28

Pa. R. Crim. P. 904(B) 30

Tenn. Code Ann. § 40-30-106. 30

Wash. Rev. Code Ann. §10.73.150. 28

INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with membership of more than 12,500 attorneys and 35,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote research in the field of criminal law, to advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. Among the NACDL's objectives are to ensure the proper administration of justice and appropriate application of criminal statutes in accordance with the United States Constitution. Consistently advocating for the fair and efficient administration of criminal justice, members of the NACDL have a keen interest in assuring that 28 U.S.C. § 2254 is applied in an even-handed and readily understood way. NACDL has a special interest in insuring the statute's fair application to its many indigent clients, whose rights to state-funded counsel may expire at a time when they must make important litigation

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1. Pursuant to Rule 37, amici curiae state that both parties have consented to the filing of this brief, and that no party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

decisions affecting their rights to subsequent habeas relief.

The National Association of Federal Defenders (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

The NAFD's membership have, collectively, represented hundreds, if not thousands, of petitioners and movants under 28 U.S.C. §§ 2254 and 2255. This experience spans both capital and non-capital cases. One of the guiding principles of the NAFD is to promote the fair adjudication of justice by appearing as amicus curiae in litigation relating to criminal-law issues, particularly as those issues affect indigent defendants in federal court.

SUMMARY OF ARGUMENT

In Griffith v. Kentucky, 479 U.S. 314 (1987), and Teague v. Lane, 489 U.S. 288 (1989), this Court constructed an easily understood standard for determining whether new federal rules of criminal procedure apply to pending cases: new rules apply in all cases pending on direct review or not yet final, but not in cases on collateral review unless narrow exceptions apply. For over twenty years, Griffith and Teague have provided a clear line separating the precedents on which habeas petitioners (and other litigants) may rely from those unavailable to them.

In this case, the Court of Appeals for the Third Circuit construed 28 U.S.C. § 2254(d), which requires habeas courts to apply this Court's "clearly established Federal law," in a manner that complicated and confused the clear retroactivity principles set forth in Griffith and Teague. According to the Third Circuit, a new rule is "clearly established" under § 2254(d), and therefore available on habeas review, only if this Court announces it before the last state court decision on the merits. The court arrived at this conclusion through a misinterpretation of the dicta of the divided members of this Court in Williams v. Taylor, 529 U.S. 362 (2000), and dicta in subsequent opinions.

An interpretation of § 2254(d) that required this pre-finality cutoff date would have pernicious effects. It would place habeas review beyond the reach of petitioners whose cases were not yet final when new rules were announced, and who were thus

entitled to apply those rules retroactively under Griffith, and beyond the reach of petitioners who could satisfy one of the Teague exceptions and the statute of limitations set forth in § 2244(d). It would allow states that decided to provide a post-conviction forum for new federal rules to do so without any federal habeas oversight, disadvantage indigent and incarcerated petitioners, and place an undue burden on the discretionary review dockets of this Court and the state courts of last resort.

This Court's retroactivity jurisprudence already works to provide a fair balance of the federal and state interests implicated in habeas review. The Court should not allow § 2254(d) to do the work of retroactivity doctrine, but should confine the provision to its own proper function of setting the standard for federal habeas review of state court judgments. The Third Circuit's construction of the statute to require a pre-finality cutoff date for the announcement of "clearly established Federal law" should therefore be rejected.

ARGUMENT

THE THIRD CIRCUIT'S PRE-FINALITY CUTOFF DATE FOR THE ANNOUNCEMENT OF "CLEARLY ESTABLISHED FEDERAL LAW" WOULD BLUR THE BRIGHT-LINE RETROACTIVITY RULE OF GRIFFITH AND TEAGUE, CONTRADICT OTHER STATUTORY PROVISIONS AND OTHER PRECEDENTS OF THIS COURT, AND CREATE PRACTICAL PROBLEMS FOR LITIGATING HABEAS CASES.

A. Introduction

Eric Greene sought habeas relief in the Court of Appeals for the Third Circuit for a Confrontation Clause violation that occurred when his codefendants' redacted statements were introduced against him at trial. Gray v. Maryland, 523 U.S. 185 (1998), decided before Greene's Pennsylvania conviction became final, governed his case under this Court's well-settled retroactivity jurisprudence. See Teague v. Lane, 489 U.S. 288 (1989); Griffith v. Kentucky, 479 U.S. 314 (1987). Under Gray, Greene should have received either state-court or federal habeas relief for the ineffective redactions of his codefendants'self-serving statements, which he could not cross-examine. The Third Circuit, however, declined to apply Gray. Construing 28 U.S.C. §

2254(d), the panel majority held that the "clearly established Federal law" that must govern a federal habeas claim has a pre-finality cutoff date. Even though Griffith and Teague require the retroactive application of all new constitutional rules of criminal procedure announced by this Court before a conviction becomes final, and in some cases even later, the Third Circuit panel majority determined that a rule is "clearly established" under § 2254(d) only if it is announced before the last state court decision on the merits. Because this Court decided Gray after that date in Greene's case (albeit before finality), the majority held, § 2254(d) precluded its application to the analysis of his Confrontation Clause claim.

The clients of amici curiae, the National Association of Criminal Defense Lawyers and the National Association of Federal Defenders, have an interest in clear, comprehensible rules for habeas litigation. Griffith and Teague together provide a bright-line retroactivity rule that enables litigants to know with certainty which precedents govern their constitutional claims. The panel majority's cutoff date for "clearly established Federal law," however, by turning to the habeas statute's standard of review provision to do the retroactivity work of Griffith and its progeny, would blur that bright line, contravene both Griffith and Congressional intent, subvert § 2254(d)'s appropriate functions, and create quandaries of statutory construction and practical problems in application.

Amici agree with the reasons set forth in Petitioner's brief, and provide the following additional reasons, for reversing the Third Circuit's judgment. Section B argues that the debate between Justices Stevens and O'Connor in Williams v. Taylor, 529 U.S. 362 (2000), had nothing to do with retroactivity or the timing of "clearly established Federal law," but focused on whether § 2254(d) imposed a standard of review that circumscribed the independence of habeas courts. Accordingly, their conflicting dicta on timing cannot settle the question presented here: whether "clearly established Federal law" has a pre-finality cutoff date. Section C explains several ways in which the pre-finality cutoff rule would conflict with other rules governing the availability of federal habeas relief, including Teague, the Teague exceptions, and the statute of limitations. Finally, the section shows that, carried to its logical conclusion, the Third Circuit's rule would require de novo review of petitioner's claim. Section D describes other practical effects of the pre-finality cutoff date for (1) states that, following Danforth v. Minnesota, 552 U.S. 264 (2008), choose to provide post-conviction forums for claims based on new federal rules; (2) indigent petitioners; and (3) this Court's discretionary docket and those of state courts of last resort.

B. The Griffith-Teague Rule and § 2254(d) Perform Independent Functions.

In Griffith, the Court created a retroactivity standard that applied to all newly announced rules

of criminal procedure. It applied regardless of how substantially a new rule broke with the past and no matter what the procedural posture of a case presenting a claim under the rule. The Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final[.]" 479 U.S. at 328. The Court identified two reasons for its holding. First, "as a practical matter," because it was impossible for the Court to hear every case presenting a particular claim, it would "fulfill [its] judicial responsibility" by directing lower courts to give cases pending on direct review the benefit of the new rule. Id. at 323. Second, making new rules retroactive to cases still pending on direct review at the time of their articulation would prevent "the actual inequity that results when the Court chooses which of many similarly situated defendants should be the chance beneficiary" of the new rule. Id. (citation omitted; emphasis in original).

The Court addressed the other side of Griffith's bright-line rule in Teague. After finality, the Court held, the balance of federal and state interests weighed against retroactive application of new rules. Collateral attacks should not substitute for direct appeal, and states had a proper interest in leaving concluded litigation in a state of repose. 489 U.S. at 310. Therefore, the Court held, habeas courts should not retroactively apply new rules to cases on collateral review unless one of two exceptions applied. Id. at 311.

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which included important limitations on habeas courts' ability to grant relief to state prisoners. One of AEDPA's provisions, codified at 28 U.S.C. §2254(d), provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States

Neither this provision nor any other part of AEDPA said anything about a cutoff date or retroactivity, and this Court's cases construing the act have established that it leaves Teague untouched. In Williams v. Taylor, 529 U.S. 362 (2000), a divided Court mentioned Teague in the course of determining whether AEDPA did, or did not, create a significant new limitation on habeas courts' ability to grant relief for constitutional violations. In a section of an opinion that did not command a majority, Justice Stevens considered the meaning of "clearly established Federal law," arguing that the

term was the "functional equivalent[]" of the Teague "antiretroactivity" rule, and maintaining that "Congress had congruent concepts in mind." Id. at 379-80. Therefore, he would have held, §2254(d), in codifying Teague, had imported undiluted its requirement that federal courts make an "independent evaluation" of whether a rule was "clearly established." Id. at 383-84.

Justice O'Connor, writing for a majority in this portion of her opinion, rejected this conclusion. In her view, § 2254(d) had "only a slight connection" to Teague, see Williams, 529 U.S. at 412, and, far from codifying Teague's "previously settled rule of independent review," implemented Congress's intention to "bring change to the field." Williams, 529 U.S. at 404 (opinion of O'Connor, J.). She explained at some length that, under § 2254(d), a habeas court's review of the state court's decision was not "independent," but limited to whether the state court ruling was "contrary to" or "unreasonably applied" Supreme Court precedent. Id. at 403-12, 413.

The timing of the announcement of "clearly established Federal law" was not in issue in Williams, which concerned the application of Strickland v. Washington, 466 U.S. 664 (1984), a case decided two years before Williams's trial. Williams, 529 U.S. at 368. Justice O'Connor's opinion made self-contradictory statements about timing, and even then only incidentally to her main debate with Justice Stevens over the independence of a habeas court's review. She stated that the phrase

"clearly established Federal law" refers to holdings of this Court "as of the time of the relevant state-court decision." 529 U.S. at 412 (emphasis added). In the same paragraph, however, she elaborated that "whatever would qualify as an old rule under our Teague jurisprudence will constitute 'clearly established Federal law,'" thus implying Teague's later cutoff date, the date of finality. Id. Elsewhere she reinforced that implication, joining a portion of Justice Stevens's opinion that stated, "[t]he threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." Id. at 390 (opinion of Stevens, J.) (emphasis added), 413 (opinion of O'Connor, J.) .

In subsequent decisions, this Court has clarified that Teague survives § 2254(d)(1). In Horn v. Banks, 536 U.S. 266 (2002), the Court of Appeals had reviewed a ruling of the state court under § 2254(d) without addressing whether the controlling decision, Mills v. Maryland, 486 U.S. 367 (1988), applied retroactively. The Court of Appeals questioned whether "Teague has continued force independent of AEDPA," and reviewed the Mills claim, "not because we wish to impose a new rule not considered by the Pennsylvania Supreme Court, but as the court in fact did consider and apply it." Horn, 536 U.S. at 270, 272 (quoting 271 F.3d 527, 541 n.13, 543 (3d Cir. 2001)). This Court held that the Court Appeals had committed clear error. 536 U.S. at 271. A habeas court must apply Teague if the State

argues it. Id. (citing Caspari v. Bohlen, 510 U.S. 383 (1994)).

> [N]one of our post-AEDPA cases have suggested that . . . AEDPA relieves courts from the responsibility of addressing properly raised Teague arguments. To the contrary, if our post-AEDPA cases suggest anything about AEDPA's relationship to Teague, it is that the AEDPA and Teague inquiries are distinct. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold Teague analysis when the issue is properly raised by the state.

536 U.S. at 272; accord Whorton v. Bockting, 549 U.S. 406, 416 (2007) ("an old rule applies both on direct and collateral review").[2]

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2. In several cases, the Court has referred in dicta to "clearly established Federal law" at the time of the last state court decision, but, with one exception, none of those cases involved new rules announced between the last state court decision and finality. See Thaler v. Haynes, 130 S.Ct. 1171, 1174 n. 2 (2010) (per curiam) (noting that certain case could not have constituted "clearly established Federal law" because it was decided six years after finality and more than six years after relevant state court decision); Carey v. Musladin, 549 U.S. 70, 74 (2006) (quoting Justice O'Connor's reference in Williams opinion to "the time of

The Third Circuit's early cutoff date for "clearly established Federal law" would introduce unnecessary complication into the already complex domain of habeas litigation. Litigants would have to consider three different deadlines to decide whether they could even bring a habeas claim: whether the federal law was clearly established by the time of the last state court decision to satisfy § 2254(d), whether it was "dictated" by precedent existing before the date of finality to satisfy Teague, and whether the petition could be filed within a year after the date of finality to satisfy the statute of limitations. Such a scheme would not only cause unnecessary confusion and contradict Griffith and Teague, but, as further developed in the ensuing sections, would also create irreconcilable conflicts with other statutory provisions and decisions of this Court, and practical problems for courts and litigants.

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the relevant state-court decision"); Yarborough v. Alvarado, 541 U.S. 652, 660-61 (2004) (same); Wiggins v. Smith, 539 U.S. 510, 520 (2003) (review under § 2254(d)(1) limited to "law as it was 'clearly established' by our precedents at the time of the state court's decision."); Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003) (relevant time is when "the state court renders its decision")). The exception is Smith v. Spisak, 130 S.Ct. 676, 681 (2010), in which the Court, construing § 2254(d)(1), expressed "some uncertainty" whether a case decided between the date of the last relevant state court decision and the date that the petitioner's case became final was "clearly established Federal law," but assumed that it was.

C. Setting a Cutoff Date for "Clearly Established Federal Law" at the Time of the Last State Court Decision Would Collide with Other Rules Governing the Availability of Habeas Relief.

1. The Third Circuit's Construction Would Take Away Habeas Review That Would Otherwise Be Available Under Teague or the Statute of Limitations.

This Court has repeatedly held that Congress enacted § 2254 to promote the states' interest in the finality of their judgments. See, e.g., Mayle v. Felix, 545 U.S. 644, 662 (2005) (citing Rhines v. Webber, 544 U.S. 269, 276 (2005)); Duncan v. Walker, 533 US 167, 180 (2001). Looking to Griffith and Teague to govern retroactivity would amply satisfy the states' interests. The early cutoff date set by the panel majority, however, without advancing that legitimate purpose, would nullify other rules – incorporated in the statute or in this Court's jurisprudence – that govern the availability of habeas relief.

First, the early cutoff date would create what Judge Ambro, dissenting below, termed a "twilight zone" for petitioners who were entitled under Teague to apply a new rule to the review of their claims, but could not secure that review because the last state court decision came too early. Greene v. Palakovich, 606 F.3d 85, 115-16 (3d Cir. 2010) (Ambro, J.,

dissenting). Pet. App. 62a. The majority's rule would lead to injustice:

> A well-meaning state court system could innocently neglect to apply Griffith after its final decision on the merits, but before the conviction becomes final. If a state court were to ignore the mandate to apply the new rule to all cases still pending on direct appeal or not yet final, it would similarly undermine the integrity of judicial review. That would leave collateral review by habeas corpus as the only remedy to correct the mistake. Surely a criminal defendant is entitled to recourse if the state courts simply forget to check for new, relevant Supreme Court precedent prior to finality . . . . Yet, under the majority's selection of temporal cutoff, even that remedy would be foreclosed[.]

Id. at 118 (Ambro, J., dissenting).

A state court could also deliberately evade its responsibility to apply a new federal rule enunciated while a case was still pending on discretionary review, as the Pennsylvania Supreme Court appears to have done in petitioner's case by dismissing it after full briefing that called Gray to its attention. This Court should not countenance a rule that would permit a state court to flout its primary duty to

enforce the Constitution. See Cullen v. Pinholster, 131 S.Ct. 1388, 1398-99 (2011) ("The federal habeas scheme leaves primary responsibility with the state courts") (quoting Woodford v. Visciotti, 537 U.S. 19, 27 (2002)); cf. Thompson v. Runnels, ___ F.3d ___, 2011 WL 2279451, *11-12 (9th Cir. June 9, 2011) (interests of comity and judicial efficiency underlying exhaustion requirement did not require petitioner to "reexhaust" his claim based on new decision of this Court announced after last state court decision but before finality, where petitioner had called that case to attention of state court in petition for discretionary review, but "that court elected to decide the issue without the benefit of forthcoming authority").

The panel majority countered Judge Ambro's concerns by pointing to what it considered the incongruity of evaluating a state court ruling on the basis of "a Supreme Court decision that did not exist at the time of its decision." 606 F.3d at 98. It would be perfectly consistent with this Court's jurisprudence, however, to assess the reasonableness of a state court decision in light of a new rule not enunciated until later; in fact, this Court has held that a habeas court can make that determination without the benefit of any explicit discussion of the controlling Supreme Court decision, or even any state court opinion at all. See Harrington v. Richter, 131 S.Ct. 770, 785 (2011) ("§ 2254(d) does not require a state court to give reasons before its decision can be deemed to have been 'adjudicated on the merits'"); Early v. Packer, 537 U.S. 3, 8 (2002) (reasonableness of state court ruling under § 2254(d) "does not

require citation of our cases-indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them").

In addition, the early cutoff date would render Teague's exceptions meaningless. Under Teague, a new rule may govern a petitioner's claim, even if this Court announces it after a conviction becomes final, if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or constitutes a "watershed rule[] of criminal procedure." 489 U.S. at 311. The Teague exceptions serve an important function, ensuring that constitutional protections enunciated in some of the Court's weightiest decisions apply consistently to all affected petitioners. See, e.g., Whorton, 549 U.S. at 419 (recognizing Gideon v. Wainwright, 372 U.S. 335 (1963) as watershed rule under second Teague exception because providing counsel to indigent defendants "eliminate[s]" "intolerably high" risk of unreliable verdicts); Bell v. Cockrell, 310 F.3d 330, 332 (5th Cir. 2002) (recognizing that Atkins v. Virginia, 536 U.S. 304 (2002), applies to cases on post-conviction review because it declares mentally retarded offenders categorically ineligible for death penalty and thus falls under first Teague exception). Under the Third Circuit majority's reading, however, those new rules would "apply" under Teague without entitling any habeas petitioners to relief, because they would not constitute "clearly established Federal law." See 606 F.3d at 118 (Ambro, J., dissenting).

Furthermore, the early cutoff date would create conflicts with the statute of limitations embodied in 28 U.S.C. § 2244(d), which provides:

> (d)(1) A period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
>
> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (D) the date on which the factual predicate of the claim or claims

> presented could have been discovered through the exercise of due diligence.

Under the panel majority's view, a petitioner could file a claim that was timely under any of these provisions, but barred because the "clearly established Federal law" upon which the claim relied post-dated the last relevant state court decision. Such a claim, if based on a new rule announced before finality and filed within a year of finality, would not only satisfy Teague but would also be timely under subsection (A). If the petitioner based the claim, not only on a new rule announced before finality, but also on new evidence that could not have been presented through due diligence until after finality, it would be timely under subsection (D). Similarly, such a claim would be timely if filed within a year after removal of a state-created impediment (such as a prison law library's failure to provide a copy of AEDPA[3]), or after this Court announced a rule made retroactive to cases on collateral review (subsections (B) and (C)).

Nothing in AEDPA, its legislative history,[4] or this Court's jurisprudence supports a construction of "clearly established Federal law" that would grant petitioners habeas review with one hand, under the Griffith-Teague rule or the statute of limitations, but then take it away with the other, under § 2254(d).

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3. See Egerton v. Cockrell, 334 F.3d 433 (5th Cir. 2003).

4. See Brief for Petitioner at 27-29.

2. The Early Cutoff Rule for "Clearly Established Federal Law," If Carried to its Logical Conclusion, Would Require De Novo Review of a Claim Based on a New Rule Announced After the Last State Court Decision.

The Third Circuit's decision implicates another important question of statutory construction. Section 2254(d) limits a habeas court's ability to grant relief "with respect to any claim that was adjudicated on the merits in State court proceedings." If the state court did not adjudicate the claim on the merits, however, a habeas court must review it de novo (as long as the petitioner encounters no other obstacles to relief such as untimeliness, non-exhaustion, or default). See, e.g., Porter v. McCollum, 130 S. Ct. 447, 452 (2009) ("Because the state court did not decide whether Porter's counsel was deficient, we review this element of Porter's Strickland claim de novo."); Rompilla v. Beard, 545 U.S. 374, 390 (2005); Wiggins v. Smith, 539 U.S. 510, 534 (2003)).

In petitioner Greene's case, the Third Circuit majority followed the early cutoff date for "clearly established Federal law," in part, because it found it anomalous to evaluate the state court's adjudication of a claim on the basis of a new federal rule that did not exist at the time of the state court decision. 606 F.3d at 98. A logical consequence of an approach that would view Gray as too unanticipated to be regarded as clearly established, however, is the conclusion that the Gray claim was a new claim that

the state courts declined to adjudicate on the merits, and that Petitioner should have received de novo review of the claim in the federal courts.

The intermediate appellate court that ruled on Petitioner's Bruton claim applied Richardson v. Marsh, 481 U.S. 200 (1987), and held that the redactions of the codefendants' statements effectively cured the Confrontation Clause problem. J.A. 128. Richardson reserved judgment on the question later resolved in Gray: the admissibility of a codefendant's confession in which the defendant's name has been replaced with a symbol or neutral pronoun. See Richardson, 481 U.S. at 211 n. 5. The Pennsylvania Supreme Court, because it determined that Mr. Greene's petition for discretionary review had been improvidently granted, never ruled on the Gray claim he presented in that court.

The dividing line between new and old claims, like that between new and old rules, can be difficult to discern and apply. See Cullen v. Pinholster, 131 S.Ct. 1388, 1401 n.10 (2011) (Thomas, J., for majority) (new evidence supporting Brady claim may give rise to new claim); id. at 1419 (Sotomayor, J., dissenting) (under majority's hypothesis, new claim, never having been adjudicated on merits, would be reviewed de novo); Mayle v. Felix, 545 U.S. 644, 657 (2005) (out-of-time Rule 15 amendment to habeas petition not permitted for "new claims" that "depend upon events separate in both time and type" from the originally raised episodes); Gonzalez v. Crosby, 545 U.S. 524, 532 (2005) (Rule 60(b) motion unavailable to bring "new

claims" that advance new grounds for relief or attack the previous resolution of the case on the merits). A rule that treats Gray as too novel to be "clearly established" under § 2254(d), however, of necessity implies that the Gray claim was a new claim, and would take it outside the scope of §2254(d). See Pinholster, 131 S.Ct. at 1419 (Sotomayor, J., dissenting). If no state court ever ruled on the merits of Petitioner's Gray claim, it should have received de novo review. The paradox involved in construing AEDPA, in the name of comity, in a way that would require federal courts to decide claims without applying the AEDPA standard of review at all is another reason to reject the Third Circuit's interpretation of "clearly established Federal law."

D. A Pre-Finality Cutoff Date for "Clearly Established Federal Law" Would Create Other Practical Problems for Litigating and Deciding Cases on Direct and Collateral Review.

1. The Early Cutoff Date Would Deny Habeas Review to Petitioners in States That, Following Danforth v. Minnesota, Provide a Post-Conviction Forum for New Federal Constitutional Rules Enunciated After Finality.

The panel majority's early cutoff rule would deprive an entire class of petitioners of any habeas review for federal constitutional claims they have appropriately filed under state procedural rules. In Danforth v. Minnesota, 552 U.S. 264 (2008), the

state court had determined that it could not retroactively apply Crawford v. Washington, 541 U.S. 36 (2004), on state post-conviction review, because this Court had held in Whorton v. Bockting, 549 U.S. at 421, that it was a new rule unavailable in federal habeas review. This Court held in Danforth, however, that the state court could afford a post-conviction forum for a newly recognized federal claim. Justice Stevens explained why the states may make their own decisions, based on their own prudential concerns, about whether to entertain claims for relief under the new rule by petitioners whose convictions are already final:

> [T]he very word 'retroactivity' is misleading because it speaks in temporal terms. 'Retroactivity' suggests that when we declare that a new constitutional rule of criminal procedure is 'nonretroactive,' we are implying that the right at issue was not in existence prior to the date the 'new rule' was announced. But this is incorrect. . . . [T]he source of a 'new rule' is the Constitution itself, not any judicial power to create new rules of law. Accordingly, the underlying right necessarily pre-exists our articulation of the new rule. What we are actually determining when we assess the 'retroactivity' of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the

> announcement of the new rule will entitle a criminal defendant to the relief sought.

552 U.S. at 271. The rule in Teague arose from the Court's authority to interpret the federal habeas statute "in accordance with equitable and prudential considerations," and rested on federalism and comity principles inapplicable to the states' management of their own courts. Id. at 278-79.

> [W]hile finality is, of course, implicated in the context of state as well as federal habeas, finality of state convictions is a state interest, not a federal one. It is a matter that States should be free to evaluate, and weigh the importance of, when prisoners held in state custody are seeking a remedy for a violation of federal rights by their lower courts.

Danforth, 552 U.S. at 280 (citations omitted; emphasis in original). Accordingly, the Court held, the states, as independent sovereigns, were free to "provide a remedy for a violation that is deemed 'nonretroactive' under Teague." 522 U.S. at 280, 282; cf. Rhines v. Weber, 544 U.S. 269, 276-77 (2005) (allowing federal habeas courts to stay habeas proceedings and hold them in abeyance pending exhaustion of unexhausted claims in state courts allows state a fair opportunity to rule in first instance on federal claims).

More recently, the Court has held that, when a state decides to subordinate its own finality interests to other important concerns, that decision can affect the judgment's finality for statute of limitations purposes. In Jimenez v.Quarterman, 129 S.Ct. 681, 684 (2009), the state court allowed Jimenez to reopen and file an out-of-time appeal after the original appeal was improperly dismissed under Anders v. California, 386 U.S. 738 (2009). This Court observed that AEDPA's interests in comity, finality, and federalism were adequately served by giving states "'the first opportunity to review [the] claim,' and to 'correct' any 'constitutional violation in the first instance.' " Id. at 686 (quoting Carey v. Saffold, 536 U.S. 214, 220 (2002); Williams v. Taylor, 529 U.S. 420, 436 (2000); O'Sullivan v. Boerckel, 526 U.S. 838, 844-45 (1999)). Therefore, the Court held, Jimenez's conviction became final and the statute of limitations began running at the conclusion of the reopened appeal, not the original appeal. Id. at 685-87.[5]

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5. The Court distinguished Beard v. Banks, 542 U.S. 406 (2004). While, under Beard, "the possibility that a state court may reopen direct review 'does not render convictions and sentences that are no longer subject to direct review nonfinal,'" "where a state court has in fact reopened direct review, the conviction is rendered nonfinal for purposes of § 2244(d)(1)(A) during the pendency of the reopened appeal." Jimenez, 129 S.Ct. at 686 n.4 (emphasis added). Beard, decided several years before Danforth, had case-specific features that led to its result. The state court had reviewed the Mills claim on the merits under a lenient "relaxed waiver" regime that excused procedural defaults

Taken together, these cases demonstrate that federal habeas courts must defer to states' weighing of their own finality interests. By definition, a Danforth state has determined that its interest in finality is outweighed by an interest in providing a post-conviction forum for an important federal claim. Cf. State v. Preciose, 609 A.2d 1280, 1292 (N.J. 1992) (cited in Danforth, 552 U.S. at 279) ("From our state perspective, finality is achieved when our courts grant or deny post-conviction relief. Any state court judgment later overturned by federal habeas review presumably will have been undeserving of finality. We are not so convinced of our infallibility, or so jealous of our sovereignty, as to deem federal habeas review an undesirable intrusion on our adjudications.").

Thus, once a state has provided post-conviction review for a federal claim based on a new rule of criminal procedure, neither Teague nor AEDPA can properly bar federal habeas review of its ruling on the merits. Where a state court has made the conscious judgment that a petitioner should receive review under a new federal rule even though

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in capital cases on a discretionary basis. That regime had been abandoned before Beard reached the Supreme Court, and the state supreme court had suggested in another case that it would not give Mills retroactive effect. 542 U.S. at 412. Beard thus implicated the very state comity and finality concerns that underlie this Court's retroactivity jurisprudence. A Danforth state, in contrast, will have determined that state interests weigh in favor of retroactively applying a new federal rule, not against it.

Teague would permit the state court to withhold that benefit, the federalism, comity, and finality interests that support the Teague rule fall away, leaving behind the federal courts' obligation to enforce the Constitution. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 349 (1816). A state that chooses to provide a post-conviction forum for litigation of a federal constitutional claim should not be immune from habeas review.

The early cutoff date for "clearly established law" adopted by the panel majority in Greene's case would deprive Danforth petitioners of the federal habeas review to which they would otherwise be entitled. In effect, the Third Circuit majority adopted a cutoff date of the last state court decision or finality, whichever is earlier. To do justice to Danforth petitioners, the cutoff date should instead be the date of finality or the last state court decision, whichever is later.

2. The Third Circuit's Rule Would Place an Unfair Burden on Indigent Petitioners, Who Are Generally Unrepresented During All or Part of the Time Between the Last State Court Decision on the Merits and the Date the Conviction Becomes Final.

The Third Circuit's early cutoff rule would have an onerous impact on indigent petitioners. Under its interpretation of "clearly established Federal law," a petitioner could obtain federal review on the basis of a new rule announced after the last

state court decision, but before the conviction was final, only by petitioning this Court for certiorari. But the right to state-funded counsel generally expires before a conviction becomes final. Thus, only indigent petitioners blessed with considerable forensic skill and luck could have any hope of vindicating their rights under newly announced rules.

Petitioner Greene was prosecuted and convicted in Pennsylvania. That state, like others, provides counsel for indigent defendants for all avenues of direct appeal, through the seeking of discretionary review (and further proceedings if review is granted) in the Pennsylvania Supreme Court. See Pa. R. Crim. P. 122 & comment (counsel retains appointment through final judgment, including appeal through Supreme Court of Pennsylvania); Commonwealth v. Liebel, 825 A.2d 630, 633 (Pa. 2003).[6]

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6. See also Kargus v. State, 169 P.3d 307, 312 (Kan. 2007) (concluding that Kansas Legislature intended that a defendant's right to counsel in direct appeal of felony conviction extends to all levels of state appellate process, including filing of petition for review); N.J. Ct. R. 2:7-2(a) (providing counsel to indigents for appeal from the conviction and "such post-conviction proceedings or appeal therein as would warrant the assignment of counsel"); Wash. Rev. Code Ann. §10.73.150 (providing counsel for indigents to pursue state court discretionary review in some circumstances); State ex rel. Schmelzer v. Murphy, 548 N.W.2d 45, 47-48 (Wis. 1996) (defendant has statutory right to counsel for petition for discretionary review).

Many other states do not provide counsel to indigent defendants for discretionary review in the highest state court, but only for the first appeal as of right.[7] Although many states, including Pennsylvania, appoint counsel to prisoners to pursue post-conviction or other collateral relief, the appointment generally does not occur until after the prisoner has filed a pro se collateral pleading, which

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7. See Birdsong v. State, 929 So.2d 1027, 1028 (Ala. Crim. App. 2005) (criminal defendant not entitled to counsel on discretionary appeal to Alabama Supreme Court); Small v. State, 920 A.2d 1024, 1026-27 (Conn. App. 2007) (no Sixth Amendment right to counsel for discretionary review following first appeal of right); People v. Love, 727 N.E.2d 680, 683 (Ill. App. 2d Dist. 2000) (constitutional right to counsel applies through trial and first appeal of right, and no further); Moore v. Commonwealth, 199 S.W.3d 132, 136 (Ky. 2006) (constitutional right to counsel limited to first direct appeal and not to discretionary appeals or collateral attacks); Hathaway v. State, 741 N.W.2d 875, 880 (Minn. 2007) (petitioner's right to counsel under state constitution satisfied by assistance of counsel in one appeal); State v. Mata, 730 N.W.2d 396, 481-82 (Neb. 2007) (right to counsel does not extend to discretionary appeals to state's highest court); State v. Carter, 757 N.E.2d 362, 363 (Ohio 2001) (right to appointed counsel in criminal matter extends to first appeal as of right, and no further); Douglas v. State, 631 S.E.2d 542, 543 n.1 (S.C. 2006) (no constitutional right to effective assistance when seeking discretionary appellate review); Ex parte Riley, 193 S.W.3d 900, 902 (Tex. Crim. App. 2006) (while defendant has right to file petition for discretionary review, no right to appointed counsel to assist in filing petition).

of necessity occurs well after direct review has concluded and the conviction is final.[8]

Thus, in some states, a prisoner will be completely unrepresented after intermediate appellate review. Even in states that, like Pennsylvania, provide counsel through the end of discretionary state review, the representation ends when the certiorari process begins, an interval that often lasts more than six months.[9] Further, even states that appoint counsel for collateral review generally do so only after the filing of the state post-conviction petition, well after the conviction is final.

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8. See 42 Pa. C.S.A. § 2545(b)(1), (3) (petition must be filed within one year of date judgment becomes final at conclusion of discretionary review in Supreme Court of United States); Pa. R. Crim. P. 904(B) (providing for appointment of counsel for indigent defendant following initiation of post-conviction proceedings); Commonwealth v. Smith, 818 A.2d 494, 498-501 (Pa. 2003) (indigent first-time post-conviction petitioner entitled to assistance of counsel); see also, e.g., 16A Ariz. Stat. Ann., Crim. Pro. R. 32.4 (c)(2) (providing for appointment of counsel for initial postconviction petitions); Tenn. Code Ann. § 40-30-106 (court may appoint postconviction counsel upon determination that petitioner is indigent and in need of counsel).

9. Compare, e.g., Commonwealth v. Padilla, 253 S.W.3d 482 (Ky. June 19, 2008) (denying reh'g), with Padilla v. Kentucky, 129 S.Ct. 1317 (Feb. 23, 2009) (grt'g cert.).

As a result of the porous condition of the states' provisions for appointed counsel, the Third Circuit's cutoff date would unjustly disadvantage indigent petitioners. The rule would provide only one very narrow avenue of review that would require skill and speed to navigate. Unrepresented, and generally incarcerated, petitioners would have to learn of the new rule in time to seek certiorari. In addition, they would have to possess sufficient legal knowledge to understand that, although this Court had just announced the new rule, the only way to claim its benefit was to present the identical claim to this Court instead of filing a habeas petition.

The unjust impact of the early cutoff rule upon uncounseled indigents is another reason to conclude that the Third Circuit's construction of "clearly established Federal law" makes no sense.

3. The Early Cutoff Rule Would Burden the Discretionary Dockets of this Court and State Courts of Last Resort.

Petitioner argues that a rule establishing the cutoff date for "clearly established Federal law" at the date of the last state court decision on the merits would place unwarranted burdens on this Court's docket. Its practice of granting certiorari, vacating the judgment below, and remanding for further consideration in light of a new opinion ("GVR"), always considered discretionary, would, in justice, need to become mandatory. Because petitioners affected by a new rule could no longer seek review under the rule in habeas proceedings, the Court

would have to modify its practice to address the reality that, for petitioners whose cases fell in the "twilight zone," seeking certiorari would be the only avenue open to them. Brief for Petitioner at 40. As a consequence, moreover, those petitioners would satisfy the constitutional test to qualify for appointment of counsel on appeal, and could bring ineffective assistance of counsel claims if their attorneys did not provide constitutionally adequate advice and assistance in connection with seeking a GVR. Id. at 41-44.

The early cutoff rule would have a similar impact on the discretionary dockets of state courts of last resort. The fact that claimants could obtain review under a new federal rule only on discretionary review (either in state court or in this Court) would increase pressure on the state courts to take cases in order to address errors that otherwise could be corrected through state post-conviction review. Many states do not provide counsel to indigents for discretionary review, but once discretionary review became the only avenue for pursuing a claim under a new rule, appointing counsel for discretionary review would become constitutionally necessary and ineffective assistance in connection with discretionary review claims a possibility. Ironically, then, the Third Circuit's early cutoff rule, by adding to the burdens of state courts, would disserve federalism instead of serving it.

CONCLUSION

This Court's retroactivity jurisprudence does its job effectively. The term "clearly established Federal law" in 28 U.S.C. § 2254(d) performs a different function and should be confined to that function. Interpreting the statute to provide a pre-finality cutoff date would unduly complicate and frustrate habeas petitioners' legitimate efforts to obtain review of their federal claims in federal court. For these reasons, as well as those in petitioner's brief, the judgment of the Court of Appeals for the Third Circuit denying him habeas corpus relief should be reversed.

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AMICUS CURIAE BRIEF

BRIEFS

No. 10-637

In The Supreme Court of the United States

ERIC GREENE,
Petitioner,

v.

JON FISHER,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF TEXAS, DELAWARE, FLORIDA, KENTUCKY, MAINE, MICHIGAN, MONTANA, NORTH DAKOTA, PENNSYLVANIA, UTAH, WASHINGTON, WISCONSIN AND WYOMING AS AMICI CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

Page

Interest of Amici Curiae 1

Relevant Statutory Provisions 1

Statement 2

Summary of Argument 3

Argument 5

I. Greene's Arguments Cannot Be Reconciled With the Past-Tense Verbs in Section 2254(d)(1) 5

II. Section 2254(d) Does Not Alter *Teague*'s Non-Retroactivity Doctrine, But Rather Establishes a Separate and Independent Relitigation Bar to Habeas Relief 10

III. This Court's Interpretations of Section 2254(d) in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster* Represent Holdings, Not Dicta 16

IV. Greene Had the Opportunity to Seek Correction of the State-Court Rulings By Filing a Certiorari Petition With This Court 21

Conclusion 22

TABLE OF AUTHORITIES

Page

Cases

Carey v. Musladin,
549 U.S. 70 (2006) 4, 15, 17, 20, 21

Estate of Cowart v. Nicklos Drilling Co.,
505 U.S. 469 (1992) 5

Cullen v. Pinholster,
131 S. Ct. 1388 (2011) ..... *passim*

Foxworth v. St. Amand,
570 F.3d 414 (1st Cir. 2009) 3, 19-20

Gray v. Maryland,
523 U.S. 185 (1998) 2

Greene v. Palakovich,
606 F.3d 85 (3d Cir. 2010) 2, 3, 4, 17

Griffith v. Kentucky,
479 U.S. 314 (1987) 10

Harrington v. Richter,
131 S. Ct. 770 (2011) 11

Horn v. Banks,
536 U.S. 266 (2002) (per curiam) 11

Lockyer v. Andrade,
538 U.S. 63 (2003) ..... *passim*

Mapp v. Ohio,
367 U.S. 643 (1961) 18

Miranda v. Arizona,
384 U.S. 436 (1966) 18

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 18

Roe v. Wade,
410 U.S. 113 (1973) 18

Roper v. Simmons,
543 U.S. 551 (2005) 17, 18

Teague v. Lane,
489 U.S. 288 (1989) ..... *passim*

Michael Williams v. Taylor,
529 U.S. 420 (2000) 5

Terry Williams v. Taylor,
529 U.S. 362 (2000) ..... *passim*

Yarborough v. Alvarado,
541 U.S. 652 (2004) 4, 15, 16, 20

Statutes

28 U.S.C. § 2254(d) ..... *passim*

28 U.S.C. § 2254(d)(1) ..... *passim*

28 U.S.C. § 2254(d)(2) 13

Other Authorities

Cass R. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001) 18

Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005) 18

INTEREST OF AMICI CURIAE

Many litigants and jurists have tried to eviscerate the relitigation bar of 28 U.S.C. § 2254(d) by equating it with this Court's pre-AEDPA non-retroactivity jurisprudence. But section 2254(d) imposes restrictions on federal habeas relief that extend beyond the limitations imposed by *Teague v. Lane*, 489 U.S. 288 (1989), and subsequent cases. Amici curiae have an interest in ensuring that federal courts respect and enforce the statutory limits on post-conviction habeas review.

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 2254(d) states:

> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT

After a jury convicted Eric Greene of murder, Greene appealed to the Pennsylvania Superior Court, claiming that prosecutors violated the Confrontation Clause by introducing his co-defendants' redacted confessions. The Pennsylvania Superior Court rejected this claim and affirmed the conviction, and Greene petitioned for allowance of discretionary appeal with the Pennsylvania Supreme Court.

While that petition was pending, this Court clarified the protections of the Confrontation Clause in *Gray v. Maryland*, 523 U.S. 185 (1998). Although the Pennsylvania Supreme Court subsequently granted review, it eventually dismissed the appeal as improvidently granted, and Greene declined to file a petition for a writ of certiorari in this Court.

Greene reasserted his Confrontation Clause claim in federal habeas proceedings, seeking to rely on *Gray*. But the Pennsylvania Superior Court had already adjudicated his Confrontation Clause claim on the merits, triggering section 2254(d)'s relitigation bar. Because *Gray* postdates the decision of the Pennsylvania Superior Court, the Third Circuit held that *Gray* was not "clearly established federal law" under 28 U.S.C. § 2254(d)(1). *See Greene v. Palakovich*, 606 F.3d 85, 98 (3d Cir. 2010). Judge Ambro dissented, arguing that section 2254(d) allows federal habeas courts to consider "clearly established federal law" at the time the conviction becomes final

on direct appeal—even if that includes Supreme Court rulings announced after the state court's adjudication on the merits. *See* 606 F.3d at 109-19. The First Circuit has also adopted the approach in Judge Ambro's dissent. *See Foxworth v. St. Amand*, 570 F.3d 414, 430-32 (2009).

SUMMARY OF ARGUMENT

Section 2254(d) generally blocks federal courts from granting habeas relief on a "claim that was adjudicated on the merits in State court proceedings," but provides an exception if the state-court adjudication "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (emphases added). The past tense of the verbs "resulted," "was," and "involved" mandates that the "contrary to" and "unreasonable application of" inquiries be evaluated at the time of the state-court decision, rather than the time of federal habeas review. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). And the past tense of the adjective "established" means that the pertinent Supreme Court holdings must predate the relevant state-court adjudication. Greene wants this Court to treat section 2254(d)(1) as if it authorized relief whenever a state-court adjudication "resulted in a decision that *became* contrary to, or *became* an unreasonable application of, clearly established Federal law, *by the time the conviction became final*." But that construction cannot be squared with the statutory

language, and Greene does not even attempt to reconcile his proposed interpretation of section 2254(d)(1) with the statute's use of the past-tense verbs "resulted" and "was."

This Court has repeatedly held that the time for determining "clearly established federal law" is the date of the relevant state-court decision. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011). The First Circuit had no authority to ignore these decisions, and Judge Ambro had no prerogative to dismiss them as "no more than *dicta*." *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). Unfortunately, confusion among the lower courts has arisen from this Court's contradictory statements in *Terry Williams v. Taylor*, 529 U.S. 362 (2000). Compare *id.* at 412 (O'Connor, J., for the Court) ("[T]he phrase 'clearly established Federal law' . . . refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."), with *id.* at 390 (Stevens, J., for the Court) ("The threshold question under AEDPA is whether Williams seeks to apply a rule of law that was clearly established at the time his state-court conviction became final."). Yet Justice Stevens's entire *Williams* opinion—both the portion that received five votes and his remaining analysis that spoke for only four members of the Court—reflects a determination to minimize the impact of section 2254(d) by equating it with this Court's pre-

AEDPA *Teague* jurisprudence. Justice Stevens's approach cannot withstand textual analysis of section 2254(d), as this Court's repeated post-*Williams* holdings rejecting his construction of "clearly established federal law" make clear.

Finally, if Greene believes that the decisions of the Pennsylvania courts conflict with *Gray*, then he should have sought correction on direct appeal by filing a certiorari petition with this Court. That is the proper remedy when this Court announces a new decision after the state court rules but before the prisoner's conviction becomes final. Having declined to pursue this corrective mechanism on direct appeal, Greene cannot have the federal habeas courts bail him out by disregarding the language of section 2254(d) and overruling the construction of this statute that this Court has repeatedly endorsed in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster*.

ARGUMENT

I. Greene's Arguments Cannot Be Reconciled With the Past-Tense Verbs in Section 2254(d)(1).

This Court has held many times that statutory construction must begin with the language of the statute. *See, e.g.*, *Michael Williams v. Taylor*, 529 U.S. 420, 431 (2000) ("We start, as always, with the language of the statute."); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992) ("In a statutory construction case, the beginning point must be the language of the statute."). Yet Greene treats the text

of section 2254(d) as little more than an afterthought. In his brief there is much discussion of this Court's pre-AEDPA case law, the competing opinions in *Williams*, the policy implications of the Third Circuit's ruling, and even ruminations on what Congress might have "intended" or "expected" when it enacted AEDPA. But when it comes to the language that AEDPA added to section 2254(d), and how the text applies to the facts of his case, Greene offers only vague and perfunctory remarks. *See* Pet. Br. 23, 48-49. That fact alone should raise judicial eyebrows.

As it happens, Greene has good reason to downplay the statutory language. Section 2254(d)(1) blocks a federal court from granting habeas relief on a claim that "was adjudicated on the merits in State court proceedings," "unless the adjudication of the claim—"

> *resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States.

28 U.S.C. § 2254(d)(1) (emphases added). Just last Term, this Court noted that "[s]ection 2254(d)(1) refers, in the past tense, to a state-court adjudication that 'resulted in' a decision that was contrary to, or 'involved' an unreasonable application of, established law," and concluded that "[t]his backward-looking language requires an examination of the state-court decision at the time it was made." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1398 (2011); *see also id.* at

1399 ("State-court decisions are measured against this Court's precedents as of 'the time the state court renders its decision.'" (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003))).

The Third Circuit deemed the ruling of the Pennsylvania Superior Court an "adjudication on the merits" of Greene's Confrontation Clause claim, and Greene does not contest that conclusion. But Greene does not explain how this state-court "adjudication" could have "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," based on an alleged conflict with a later-decided Supreme Court ruling. Greene seems to think that he can escape section 2254(d) by showing that the state-court decision *became* contrary to, or *became* an unreasonable application of, a clearly established Supreme Court holding at the time the conviction became final.

Greene makes no effort to derive this "finality" rule from the text of section 2254(d). On page 23 of his brief, where he quotes the statutory language, Greene offers only the following cryptic remarks:

> To the extent that the new Section 2254(d) indicates that Congress contemplated retroactivity law at all in amending the federal habeas statute, the new provision suggests that Congress envisioned maintaining a cutoff of finality. . . . [T]he statute focuses ultimately on

> the "result[]" of the state-court proceedings—on its "decision," rather than its adjudication or opinion—indicating that it is the outcome of a case, not the state court's treatment of this Court's case law, that a federal court should scrutinize.

Pet. Br. 23. How this proposed distinction between the state court's "decision" and its "adjudication" leads to a "moment of finality" rule Greene does not endeavor to explain. Finality occurs when the Supreme Court of the United States denies certiorari on direct appeal, or when the time for seeking further direct appeals expires. This moment of finality postdates any moment that Greene wants to mark as the time of the state court's "decision." So even if one accepts Greene's questionable efforts to distinguish the moment of the state court's "decision" from the moment of its "adjudication," it still does not get him to the moment-of-finality rule that he asserts throughout his brief.

Greene presses an alternative argument that would allow federal habeas courts to consider all "clearly established federal law" that exists at the moment the state supreme court disposes of a case on direct review. Pet. Br. 48-49. But rather than quoting the language of section 2254(d), Greene presents this Court with a paraphrase that changes the statute's verb tense from the past to the infinitive:

> Section 2254(d) requires two things. First, it requires a state court to have "adjudicated" the

> claim on the merits. Second, it requires a state-court "decision" *to be* contrary to or an unreasonable application of, clearly established federal law."

Pet. Br. 48 (emphasis added). By deploying this not-so-subtle shift in verb tense, Greene once again tries to drive a wedge between the moment of "adjudication" and the moment of "decision." Greene acknowledges (as he must) that the state-court "adjudication on the merits" occurred when the Pennsylvania Superior Court rejected his Confrontation Clause claim on direct appeal. *See* Pet. Br. 48. But Greene insists that the relevant state-court "decision" occurred later, when the Pennsylvania Supreme Court denied discretionary review. *See id.* ("The intermediate court decision is an 'adjudication' on the merits, and the denial of discretionary review (especially after reviewing full briefing on the merits) is a 'decision' whose substantive result is contrary to federal law.").

The past-tense verbs in section 2254(d) once again foreclose Greene's construction of the statute. Greene must show that the state-court adjudication "*resulted* in a decision that *was* contrary to, or *involved* an unreasonable application of, clearly *established* Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphases added). The decision is the "result[]" of the adjudication, and if the statute envisioned a time lag between the moment of "adjudication" and the moment of "decision," it would have used the present

perfect tense, allowing federal habeas relief if a state-court adjudication "*has resulted* in a decision that" contravenes or unreasonably applies a clearly established Supreme Court holding. By sticking with the past tense throughout, the statute describes a single, specific moment for the "adjudication" and the "decision." The federal habeas court must take a snapshot of the clearly established Supreme Court holdings that existed at that time, and use that to measure the reasonableness of the state court's decision.

II. Section 2254(d) Does Not Alter *Teague*'s Non-Retroactivity Doctrine, But Rather Establishes a Separate and Independent Relitigation Bar to Habeas Relief.

Greene misstates the law and misleads the Court by describing the question presented as whether section 2254(d) "partially altered [*Teague*'s] retroactivity doctrine." Pet. Br. 2. *Teague*'s retroactivity doctrine will remain unaltered no matter how the Court rules in this case. If the Court holds that section 2254(d) excludes *Gray* from the scope of "clearly established Federal law," *Teague* will still operate to bar habeas petitioners from asserting "new rules" in federal habeas proceedings. And *Griffith v. Kentucky*, 479 U.S. 314 (1987), will still allow criminal defendants pursuing direct appeals to rely on any Supreme Court ruling announced before their judgments become final.

This Court has described 28 U.S.C. § 2254(d) as a "relitigation bar," which precludes federal habeas courts from relitigating certain issues decided by state courts. *See Harrington v. Richter*, 131 S. Ct. 770, 785 (2011). This modified collateral-estoppel rule differs significantly from *Teague*'s non-retroactivity regime, which blocks habeas petitioners from asserting "new rules" announced after their convictions become final, regardless whether a state court had previously ruled on the issue. Nothing in AEDPA purports to expand, contract, or codify the retroactivity doctrines announced in *Teague* and developed in subsequent cases. Section 2254(d) simply establishes an independent barrier to habeas relief, which supplements and does not supplant the Court-created non-retroactivity doctrine from *Teague*. As this Court recognized in *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam), "the AEDPA and *Teague* inquiries are distinct."

There are at least five ways in which *Teague*'s non-retroactivity doctrine differs from section 2254(d)'s religitation bar.

First, section 2254(d)'s relitigation bar is triggered only when the habeas petitioner's claim was "adjudicated on the merits in State court proceedings." If the state courts never adjudicated the claim on the merits, then section 2254(d) presents no barrier to relief. *Teague*, by contrast, precludes habeas petitioners from relying on "new rules" regardless whether the state courts have ruled on the petitioner's claim. In this respect, *Teague*'s non-

retroactivity barrier to relief is more expansive than section 2254(d), because it does not depend on a previous state-court adjudication, or on anything that happens in state court.

Second, when section 2254(d) applies, it limits habeas petitioners to "clearly established federal law, *as determined by the Supreme Court of the United States*." 28 U.S.C. § 2254(d) (emphasis added). *Teague*, by contrast, allows habeas petitioners to rely on any "old rule" that predates finality, and it does not purport to limit these old rules to holdings of the Supreme Court. In this respect, section 2254(d)'s barrier to relief is more expansive than *Teague*.

Third, when section 2254(d) applies, it allows habeas petitioners to escape its relitigation bar if they can satisfy the exceptions in section 2254(d)(1) or section 2254(d)(2). *Teague*, by contrast, requires a habeas petitioner to show that the result that he seeks was "dictated by precedent" existing at the time his conviction became final. *Teague*, 489 U.S. at 301. One could, for example, establish that a state-court decision unreasonably applied clearly established Supreme Court precedent, even if a habeas petitioner would be unable to show that a contrary result was "dictated by" prior precedent. In addition, section 2254(d)(2) allows habeas petitioners to surmount the relitigation bar by establishing that a state-court decision was "based on an unreasonable determination of the facts in light of the evidence presented in the state-court proceeding," even if the petitioner is relying on a "new rule" under *Teague*.

Section 2254(d)(2) has nothing to do with *Teague*'s distinction between "new rules" and "old rules"; it looks only to how the state court determined the facts.

Fourth, when section 2254(d) applies, it provides no allowance for either of the two "*Teague* exceptions" that this Court has recognized in its non-retroactivity jurisprudence. *See Teague*, 489 U.S. at 288. If a state-court adjudication triggers section 2254(d), and the habeas petitioner cannot satisfy (d)(1) or (d)(2), then habeas relief is blocked, even if he relies on a "watershed rule[] of criminal procedure." 489 U.S. at 311. In this respect, section 2254(d)'s barrier to relief is more expansive than *Teague*.

Fifth, and finally, when section 2254(d) applies, it limits habeas petitioners to clearly established federal law that existed at the time of the state court's adjudication on the merits. *See Pinholster*, 131 S. Ct. at 1398. Under *Teague*, by contrast, a habeas petitioner may rely on any law that existed at the time the petitioner's conviction became final—the moment when the Supreme Court denied certiorari or when the time for filing a certiorari petition expired.

The upshot is that some habeas claims will be blocked only by *Teague* and not by section 2254(d). Others will be blocked by section 2254(d) but not by *Teague*. And still others will be blocked by both. But the scope of the *relitigation bar* in section 2254(d) differs from the *non-retroactivity doctrine* of *Teague*. *Teague* and section 2254(d) are independent doctrines that only partially overlap.

Justice Stevens's opinion in *Terry Williams v. Taylor*, 529 U.S. 362 (2000), only some of which represents the opinion of this Court, ignores almost all of these differences between section 2254(d) and *Teague*, and asserts that section 2254(d) did little more than codify the Court's *Teague* jurisprudence. Justice Stevens thus both understates and overstates the scope of section 2254(d). Consider this passage from his opinion:

> It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

Williams, 529 U.S. at 380 (opinion of Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.). Not so. Section 2254(d)'s relitigation bar does not codify *Teague*'s general prohibition on "new rules"; its statutory prohibition on habeas relief cannot even apply unless the state courts have adjudicated the petitioner's claim on the merits. Justice Stevens is giving section 2254(d) a more expansive scope than the statutory language warrants, on account of his efforts to equate it with this Court's pre-AEDPA jurisprudence.

Justice Stevens's analysis of "clearly established Federal law" likewise reflects this misguided and textually unsupportable effort to collapse section 2254(d) into *Teague*. This time writing for a majority

of the Court, the opinion claims that "[t]he threshold question under AEDPA is whether [the petitioner] seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Williams*, 529 U.S. at 390. On this point, Justice Stevens is giving section 2254(d) too narrow a construction and, much like Greene in this case, he never reconciles this moment-of-finality test with the past-tense verbs in section 2254(d).

This interpretation of "clearly established Federal law" has been as aberrational as it is atextual. In numerous post-*Williams* cases, this Court has held that section 2254(d) requires courts to consider "clearly established federal law" at the moment of the relevant state-court decision. *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 66 (2003); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Carey v. Musladin*, 549 U.S. 70, 74 (2006); *Pinholster*, 131 S. Ct. at 1398. And in *Williams* itself, Justice O'Connor's majority opinion contradicts Justice Stevens's analysis on this point, although elsewhere the O'Connor opinion includes language that could be read to support the Stevens approach. *Compare id.* at 412 (O'Connor, J., for the Court) (declaring that the term "clearly established Federal law" means "the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*") (emphasis added), *with id.* (declaring that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the

Supreme Court of the United States' under § 2254(d)(1)"). We are not aware of any post-*Williams* opinion from this Court that has endorsed Justice Stevens's construction of the statute. Still, Justice Stevens's opinion has produced lingering tension in this Court's jurisprudence, as well as confusion in the lower federal courts. The most sensible resolution of these problems would repudiate Justice Stevens's interpretation of section 2254(d) once and for all.

III. This Court's Interpretations of Section 2254(d) in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster* Represent Holdings, Not Dicta.

Four decisions of this Court declare that section 2254(d)'s relitigation bar requires courts to examine the clearly established federal law at the time of the relevant state-court decision. *See Lockyer*, 538 U.S. at 71-72 ("'[C]learly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision."); *Yarborough*, 541 U.S. at 660-61 ("For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision.'"); *Carey*, 549 U.S. at 74 ("In *Williams v. Taylor* . . . we explained that 'clearly established Federal law' in § 2254(d)(1) 'refers to holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision."); *Pinholster*, 131 S. Ct. at 1399 ("State-court decisions are measured against this Court's

precedents as of 'the time the state court renders its decision.'") (quoting *Lockyer*, 538 U.S. at 71-72). Judge Ambro's dissenting opinion acknowledges most of these decisions, but declares that "the selection of a cutoff date in [those] cases is no more than *dicta*." *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). The First Circuit's opinion in *Foxworth* does not even acknowledge the existence of *Lockyer* and *Carey*, and although it cites *Yarborough*, it ignores the crucial passage from *Yarborough* that defines "clearly established federal law."

Judge Ambro's dissent offers only one reason for fobbing off these passages as dicta: The Supreme Court was not "required to determine the cutoff date" in those cases. *Greene*, 606 F.3d at 110 n.7 (Ambro, J., dissenting). This understanding of dicta would mark a revolutionary change in the relationship between this Court and the federal courts of appeals. On this logic, *Roper v. Simmons*'s prohibition on the juvenile death penalty is dictum and can be ignored by lower courts, because this Court was not "required to determine" whether *everyone* under the age of 18 should be exempt from the death penalty. 543 U.S. 551 (2005). *Roper* needed only to resolve whether murderers of Christopher Simmons's precise age and circumstances should be eligible for capital punishment, yet this Court opted for a broader-than-necessary holding in that case. Broader-than-necessary holdings, however, are not dicta. If they are, then it is open season not only on *Roper* but also on rulings such as *Mapp v. Ohio*, 367 U.S. 643 (1961),

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Roe v. Wade*, 410 U.S. 113 (1973). Every decision of this Court would automatically be converted into a "minimalist" ruling, as lower courts could ignore as dicta any statements that extend beyond the issues that were "required" to be determined. *See generally* Cass R. Sunstein, *One Case At A Time: Judicial Minimalism on the Supreme Court* (Harvard University Press 2001).

Any proposition that leads to and explains a court's judgment is a holding, even if its resolution is unnecessary to resolve the case. *See generally* Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953 (2005). Thus broader-than-necessary explanations cannot be ignored at will by other state and federal courts. Dicta can arise if a court writes or implies that the judgment would have been different if certain circumstances were met, but that does not describe the situation in *Lockyer*, *Yarborough*, *Carey*, or *Pinholster*.

Greene is correct to characterize Justice O'Connor's discussion in *Williams* as dictum, because the judgment in that case awarded habeas relief, and her statements that narrowly construe section 2254(d) do not lead to that judgment. *See* Pet. Br. 31-32. But Greene wisely refrains from attempting to characterize the discussions of section 2254(d) in *Lockyer*, *Yarborough*, *Carey*, or *Pinholster* as dicta. Instead, he suggests that these rulings need not be given *stare decisis* effect because the meaning of

"clearly established federal law" "was not before the court." Pet. Br. 33 & n.5. But this is just another way of saying that this Court's broader-than-necessary holdings can be disregarded by future courts. This Court often chooses to resolve cases based on principles that extend beyond the bare minimum necessary to decide the case. That does not convert a ruling into dicta that can be ignored by inferior federal judges, nor does it liberate this Court from the norms of *stare decisis*. As best we can tell, Greene does not dispute this general point, but he does not admit (as he must) that a ruling in his favor will cause this Court to overrule *holdings* in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster*.

Both Greene and Judge Ambro acknowledge this Court's decisions in *Lockyer*, *Yarborough*, and *Carey* and make a good-faith effort to distinguish them. The First Circuit's opinion in *Foxworth*, by contrast, ignores the discussion of section 2254(d) in these decisions, and declares its construction of section 2254(d) to be "dictated by precedent" in the teeth of these unacknowledged rulings.[1] *Foxworth v. St.*

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[1] The First Circuit cites *Yarborough* twice but ignores *Yarborough*'s discussion of the meaning of "clearly established Federal law," even though the respondent provided a block quotation of the relevant excerpt from *Yarborough* in his brief. *See* Resp't Br. in *Foxworth* at 30. ("For purposes of 28 U.S.C. § 2254(d)(1), clearly established law as determined by this Court 'refers to the holdings, as opposed to the dicta, of this Court's decisions *as of the time of the relevant state-court decision*.' *Williams v. Taylor* 529 U.S. 362, 412, 120 S. Ct. 1495, 146 L.Ed.2d 389 (2000). We look for 'the governing legal principle or

Amand, 570 F.3d 414, 432 (1st Cir. 2009). The First Circuit's disregard of *Lockyer*, *Yarborough*, and *Carey* does not reflect unawareness of those decisions; the respondent cited all three cases prominently in his brief.[2] Apparently the First Circuit's "close perscrutation" of Justice O'Connor's *Williams* opinion does not carry over to other on-point precedents of this Court that counsel brought to its attention. *Foxworth*, 570 F.3d at 431. The First Circuit had a responsibility to acknowledge *Yarborough*, *Lockyer*, and *Carey*, and to explain to the litigants and this Court why it did not regard those rulings as dispositive.

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principles set forth by the Supreme Court *at the time the state court renders its decisions*.' *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L.Ed.2d 144 (2003).") (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004) (emphasis supplied). The First Circuit did not even cite *Lockyer* or *Carey*.

[2] *See* Resp't Br. in *Foxworth* at 32 ("Since the *Williams* decisions, the Court has repeated Justice O'Connor's formulation as authoritative no [fewer] than three times, and has not repeated Justice Stevens' formulation, leaving no doubt that O'Connor's view is that of the Court. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003); *Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 653 (2006)."); *id.* at 30 (quoting language from both *Yarborough* and *Lockyer* supporting the State's interpretation of section 2254(d)).

IV. Greene Had the Opportunity to Seek Correction of the State-Court Rulings By Filing a Certiorari Petition With This Court.

This Court announced its ruling in *Gray* after the Pennsylvania Superior Court's adjudication on the merits but before the Pennsylvania Supreme Court's dismissal of Greene's appeal. Greene could have asked this Court to reverse the state court's decision, but he declined to petition for writ of certiorari. Greene's failure to take advantage of this remedy does not justify his current request to ignore the text of section 2254(d) as well the previous constructions of that statute that this Court adopted in *Lockyer*, *Yarborough*, *Carey*, and *Pinholster*. And section 2254(d) does not permit this Court to export decision costs to the federal habeas courts simply to reduce pressure on its summary-reversal or grant, vacate, and remand (GVR) practices. *See generally* Pet. Br. 36.

CONCLUSION

The judgment of the Third Circuit should be affirmed.

Respectfully submitted.

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